APPENDIX TABLE OF CONTENTS

	Page
Brief of Charles Mix County, South Dakota, *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581)	1a
Memorandum for the United States, *Seymour v. Superintendent*, 368 U.S. 351 (1962) (No. 8 Misc.)	34a
Brief for the United States as *Amicus* Curiae, *Mattz v. Arnett*, 412 U.S. 481 (1973) (71-1182)	37a
Brief for the United States as *Amicus Curiae, DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	60a
Brief for the United States as *Amicus Curiae, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	88a
Brief for the United States as *Amicus Curiae* Supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253)	131a
Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No.92-6281)	161a
Brief for the United States in Opposition, *Yankton Sioux Tribe v. State of South Dakota*, 796 F. 2d 241 (8th Cir. 1986)., (No. 86-1436) cert. Denied	190a
Brief for the United States as *Amicus Curiae* Supporting Respondents, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581)	202a
Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182)	233a

APPENDIX TABLE OF CONTENTS—Continued

Page

Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 239a

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 250a

Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 259a

Transcript of Oral Argument at 43-52, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581)..... 266a

APPENDIX

No. 96-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,

v. *Petitioner,*

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

and *Respondents,*

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CHARLES MIX COUNTY, SOUTH DAKOTA, *AMICUS CURIAE,* IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

INTEREST OF *AMICUS CURIAE*

The vital concern that prompts the filing of this *Amicus* Brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, more than half of the area of Charles Mix County, South Dakota, is at issue. Consequently, the approximately 6,000 people that reside there presently face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this takes place, their officials would have only limited jurisdiction and the non-members would have no elected voice in the governance of their affairs and property by the Yankton Sioux Tribe.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. This is a county that has a significant rural farm population. In terms of agricultural productivity, the land consistently produces above average yields on a state-wide basis. Approximately ninety-eight percent (98%) of the acres in Charles Mix County are classified as farm land. This farm land has an above average valuation and an above average assessed dollars per acre worth. *Ninety* percent of the land is owned by non-members and over *two-thirds* of the residents are non-members who reside on these small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See* Brief for the Cities as *Amici Curiae*. In all, there are forty-nine (49) political subdivisions within the county.

Although this Court has repeatedly recognized in this situation, that the justifiable expectations of the people should not be lightly regarded or simply swept aside, the panel majority ignored that prudential advice. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). For these reasons, the issue here is of grave importance to the residents and governments of Charles Mix County, South Dakota.

By contrast, here, as in *Hagen*, it is also important to restate what is not at issue. *Hagen*, 510 U.S. at 421. The Indian trust lands and the seat of the Yankton Sioux tribal government situated on Indian trust lands ("tribal headquarters area at Marty") are not at issue. *State v. Greger*, 559 N.W.2d 854, 859 n.4 (S.D. 1997), Pet. App. at 135. *See also* Cities Pet. Brief at 7 n.1 (Marty).

The Supreme Court of the State of South Dakota subsequently considered the identical disestablishment question in *State v. Greger*, Pet. App. at 125. In a unanimous opinion, the State Supreme Court rejected the views of the panel majority and reaffirmed the longstanding position that the Yankton reservation was disestablished. The County would submit that the views of the State Supreme Court are more in line with the principles formulated by this Court, principles that should have been controlling here.

Importantly, this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

SUMMARY OF ARGUMENT

The County fully supports the arguments set forth in the Brief of the State of South Dakota. The County further agrees that the decision of the panel majority conflicts substantially with the relevant decisions of this Court. This brief will focus on that conflict and the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v.*

Utah, 510 U.S. 399 (1994), clearly undermines the views set forth by the panel majority. The State highlights these important principles and, for that reason, they will not be repeated here.

In addition, however, a proper perspective regarding the history of disestablishment litigation before this Court is important in order to accurately assess the views of the panel majority and the dissent in conjunction with the principles set forth in these decisions. This brief is intended to serve that purpose and provide that perspective. The County starts with a brief review of the primary arguments presented and rejected in each case decided by this Court, as well as the historic perspective available or established at the time.[1] Such a review advances three overriding themes.

First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States rarely fails to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate

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[1] This brief does not address the decision of this Court in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) in detail, only because it is not truly a disestablishment case. However, *Oregon* does involve a cession agreement and the *Oregon* opinion sheds considerable light on understanding the cession process. The Supreme Court of South Dakota in *Greger* cited and discussed *Oregon* in several instances. Pet. App. at 140 n.6, 149, 150. For all of these reasons, *Oregon* is important and merits consideration in this case.

the confusion and conflicts in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are therefore closely examined for another reason. As will be seen, the United States repeatedly has made a number of important *concessions* in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian reservations. These cession concessions, made in conjunction with submissions that urged the continued recognition of other original reservation boundaires, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration.

This brief also addresses, in chronological order, the specific concessions of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *Infra* at 5. In 1984, the United States formally submitted this Yankton disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (1985); *United States v. Dion*, 476 U.S. 734 (1986). The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Moreover, in other litigation also pending at the same time, and also involving the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* considered "a similar and contemporaneous cession agreement" with "the same language" and "purpose." BUS, Co. Pet. App. at 166a. Significantly, Article XVIII of the 1858 treaty that the United States has now insisted is so important, was not mentioned in any of this.

ARGUMENT

A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority.

> Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of *whole cloth*. It is supported both by history and by the previous decisions of this Court.

Office of Solicitor General, Tr. at 22, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

1. *Seymour v. Superintendent*, 368 U.S. 351 (1962). A disestablishment issue was first presented to this Court in *Seymour*. Although we now know that the 1906 Colville Act at issue in that case was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act)—a routine matter for Congress by 1906—neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. Act of February 8, 1887, 24 Stat. 388. The *Seymour* opinion does not cite the General Allotment Act or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought.

In short, *Seymour* was decided *almost* without the benefit of any historical perspective. "Almost" is used because, although neither the General Allotment Act nor the legislative history of the specific act in question played any role in the decision, Petitioner Seymour did rely on the contrast between the 1906 Act and the earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Pet. Br. at 10, *Seymour* (No. 62). At best, this was a limited perspective, but certainly one that benefited Petitioner by simple

contrast. More important matters were not briefed, i.e. the argument that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement due to the questionable nature of the title to the Colville Executive Order Reservation and the argument that the language was added to deal with a congressional concern that undesirable precedent might be established. *Antoine v. Washington,* 420 U.S. 194, 216 (1975) (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892). *See also U.S. v. Pelican,* 232 U.S. 442 (1914). In any event, it is doubtful whether any of the above would have altered the views of the United States, which argued in support of the reservation boundaries of the South Half of the Colville Reservation ("Solicitor General has urged this construction upon the Court"). *Seymour,* 368 U.S. at 357.

The Solicitor General's three page argument was based predominantly on the 1948 statutory definition of Indian country which, of course, begs the question. It was also based upon *subsequent* congressional recognition, primarily in 1956, that the reservation continued to exist. BUS, Co. Pet. App. at 3a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as previously noted, was not even mentioned in *Seymour*). In effect, the United States attempted to attribute to both *Seymour* and the General Allotment Act,

a new congressional plan or purpose consistent with a new argument that no surplus land statute, passed pursuant to the General Allotment Act of 1887, was ever intended by Congress to disestablish portions of Indian Reservations—a "whole cloth" argument: the revisionist theory of the General Allotment Act.[2]

The United States focused on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888). No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar cession agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process. This is especially so in the absence of some affirmative evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The United States could not produce such evidence at the time—or, as a matter of fact, ever. And it will not do so in this case.) The first opportunity for the United States to advance the new revisionist theory of the General Allotment Act argument in this Court came in *Mattz v. Arnett, supra.* BUS, Co. Pet. App. at 14a-15a.

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[2] *See* the "whole cloth" disclaimer noted *supra* at 5.

2. *Mattz v. Arnett*, 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep of *Seymour* tied to the General Allotment Act, this argument met with only limited success in *Mattz*. BUS, Co. Pet. App. at 12a-14a. The history of the Klamath River Reservation at issue in *Mattz* was so tortious and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision.

Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .
>
> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. . . .

BUS, Co. Pet. App. at 10a, 14a, 24a (emphasis added). *See also, id.* at 11a, 15a n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent*. . . .

Tr. at 19-20, *Mattz* (No. 71-1182). *See also, id.* at 13, 14, 15, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished

Indian reservations. According to the United States, the Court could, by contrast, look to these examples in determining when congressional action was really intended to disestablish an Indian reservation—an instant historical perspective. BUS, Co. Pet. App. at 18a-19a. Following Petitioner's lead in *Seymour*, and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a congressional mandated disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz*, among other things:

> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, *controlling* here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservations or "restoring that land to the public domain" (368 U.S. at 355).

BUS, Co. Pet. App. at 24a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument, including a typical cession. *Id.* at 18a-19a (the *cession* example merits special attention *infra*).

At oral argument, the United States repeated the "by contrast" point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Tr. at 20-21, *Mattz* (No. 71-1182).

(Except for the cession example, the text *infra* establishes that the others on the list were representative of atypical situations encountered by Congress only on rare occasions and decades apart.)

Without question, the *Mattz* opinion reflects both arguments made by the United States. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, ... See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958). . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour, id.*, at 356, . . .

Mattz, 412 U.S. at 496, 497.

Secondly, with respect to the "by contrast" argument, the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. . . .
>
> Congress has used clear language of express termination when that result is desired. See, for example. . . .

Id. at 504, n.22 (emphasis added).

Two years later, this Court was actually presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act. With the supporting documentation of both the specific act as well as the General Allotment Act, the General Allotment Act *dicta* in *Mattz* did not dissuade the Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425, 447-449 (1975). Predictably, the United States again argued forcefully for a different result in *DeCoteau*.

3. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, the surplus land statute at issue was one of eight similar agreements in a cession format

jointly ratified in an 1891 Appropriation Act. Each of these agreements was specifically tailored to the provisions in the General Allotment Act, which had recently been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this aspect of the General Allotment Act (Section 5) and the effect the cession agreements were understood and intended to have.

Moreover, for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, setting forth a complete and proper historical perspective. That perspective established that although simple allotment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute, in a cession format, opening the reservation or a portion thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* (on the date of the opening set forth in the Presidential Proclamation). This was in precisely the same manner that pre-1887 cessions had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation, and instead urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that act, and that no act pursuant to the General Allotment Act was ever intended to effect reservation disestablishment except at some future point in time. (Again, as in the Brief for the United States in *Mattz*, the United States blurred the distinction

between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations, and surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act, which repeatedly accomplished this result). BUS, Co. Pet. App. at 37a, 38a, 39a, 40a.[3]

In addition, the United States submitted a series of very sophisticated arguments drawn from little scraps of language found in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication, however, could overcome the problem the United States never addressed: namely, the fact that all of the contemporary historical evidence irrefutably pointed to the opposite conclusion. *DeCoteau*, 420 U.S. at 432, 434, 436, 438 and 441.

Further, the cession format utilized by Congress in previous decades—with the end result never questioned in terms of reservation boundaries—was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States *now* said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted previously was compiled by the United States and noted in *Mattz*, 412 U.S. at 497, n.19). In the original version of the list presented to the Court in *Mattz*, the United States had included representative cession language. BUS, Co. Pet. App. at 18a-19a. When that cession example did not appear in the *Mattz* opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and argued throughout *DeCoteau* that the cession language was meaningless. *Id.* at 40a-41a.[4]

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[3] *See also*, Tr. at 11, 13, 17, 21, *Erickson v. U.S ex rel. Feather*, (No. 73-1500), *decided with DeCoteau.*

[4] At the time, the State of South Dakota evidently overlooked this aspect of the original list and the fact that the typical cession

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e.*, *after* the General Allotment Act, rather than the exception, this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and the remainder of the sophisticated arguments of the United States were noted and rejected for that reason. *DeCoteau*, 420 U.S. at 445.[5]

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example submitted by the United States in the Brief for the United States in *Mattz* (as "direct and unambiguous language" of disestablishment) was actually ratified in the same statute as the cession agreement presented in *DeCoteau*. BUS Co. Pet. App at 40a. To the extent that the United States was making the opposite argument in *DeCoteau*, this oversight was fortuitous for the United States in that this contradictory position was never brought to the Court's attention.

[5] As the Court in *DeCoteau* noted, as recently as 1963, the United States had joined with South Dakota in the argument that cessions disestablished reservations. Joint Brief of Respondent State of South Dakota and United States as *Amicus Curiae* at 7, *DeMarrias v. State*, 319 F.2d 845 (8th Cir. 1963) (No 17200). *DeCoteau*, 420 U.S. at 443.

Not surprisingly, in every way that is arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. In fact, as Respondent Southern Missouri Waste Management District pointed out, the Yankton Commissioners repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District at 18-19. *See also* South Dakota Representative Pickler's remarks in the Congressional Record ("same kind of a treaty we have always made" . . . "procure these lands in the same way" . . "we make no departure from our past policy" "just as all other cessions of land" . .). *Id.* at 36-37. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 9. *See generally Hagen* 510 U.S at 412-414 (public domain)

4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The United States subsequently resisted the force of *DeCoteau*. In 1977, in *Rosebud*, this Court considered three Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed. The United States again argued that, after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz*. In its brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of *the General Allotment Act of 1887*, 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system*. . .

BUS, Co. Pet. App. at 65a (emphasis in original text).

In its discussion of *DeCoteau*, the United States failed to mention the role played by Sec. 5 of the General Allotment Act and the cessions in the *DeCoteau* process. *Id.* According to the United States, *DeCoteau* was important primarily because of the differences between the cession act there and the *Rosebud* legislation, i.e., the unilateral nature of the congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed its revisionist theory of the General Allotment Act. The United States maintained that after this act, Congress never intended reservation disestablishment. *DeCoteau* was mentioned only in passing and then primarily to somehow support continued reservation boundaries throughout this period. Tr. at 20, 21, 27, 29, *Rosebud* (No. 75-562).

The *Rosebud* Court proceeded, in the most definitive opinion to date, to squarely address each and every argu-

ment—sophisticated arguments to be sure (and there were many)—advanced in support of the Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud*, together with *DeCoteau* as recognized historical background, establishes that the United States, the Yankton Sioux Tribe and supporting *Amici*, can not advance any argument of substance that has not already been answered. (And, as in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was still important in *Rosebud* and equated with reservation disestablishment.)

Unquestionably, as time went on, the cession format of the earlier period was modified, but these changes in format reflect no change in congressional intent. Thus, it ultimately mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous. . .
>
> The word is technically misused but the meaning is quite clear.

Rosebud, 430 U.S. at 597.

In the instant case, of course, the word "cession" is not technically misused. And the United States' comments

regarding real cessions in *Rosebud* (alternatively, in an attempt to distinguish *Decoteau*) bear repeating now:

> The court of appeals, however, failed to recognize the *crucial difference* that in *DeCoteau* the United States itself purchased the land in the reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the reservation. 420 U.S. at 446-447.

Memorandum of the United States at 13, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

> The 1891 Act had ratified an agreement in which the Tribe expressly *ceded* to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz*. . . . The *differences* identified by the Court are *important* to the present case. The 1891 Act was a *negotiated agreement* with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to by the Tribes. . . .
>
> The 1891 Act was a *straightforward cession for a sum certain in amount*. . . . These *distinctions* led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain. . . .
>
> In *DeCoteau* (but not in *Seymour* or *Mattz*) the *United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation.*

BUS, Co. Pet. App. at 66a, 67a (emphasis added).

The United States also reminded this Court of the 1934 Interior Department Opinion which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being part of that reservation.

54 Interior Dec. 560 (1934) (emphasis added) cited and quoted in part in Memo. of the United States at 19-21 *Rosebud* (No. 75-562) and BUS, Co. Pet. App. at 79a ("The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that '[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation'" (54 I.D. at 560)). *Id.*

It is beyond dispute that both the Sisseton and the Yankton reservation agreements are within the purview of this analysis. For this reason, as the United States pointed out, the list in the 1934 Opinion included some 26 "reservations." It did not include *either* the Sisseton or Yankton cession. BUS, Co. Pet. App. at 80a.

In oral argument, the United States reiterated, by negative implication, this same dominant point:

> [W]henever Congress *without* a binding agreement opens lands to white settlers, it does *not* pay for them and does *not* guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does *not* remove the lands from the boundaries of the Reservation.

Tr. at 22, *Rosebud* (No. 75-562) (emphasis added).

A few minutes later, the same cession distinction was stressed in a different context:

> [I]n *DeCoteau*, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed. . . .

Id. at 28.[6]

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[6] *See also* Rosebud Sioux Tribe's Brief in *Rosebud* that tracks this position and confirms that same understanding regarding the

5. *Solem v. Bartlett*, 465 U.S. 463 (1984). In *Solem*, the United States combined and restated so many variations of earlier arguments that even a summary review is difficult to present here. Moreover, since the United States did not participate in oral argument, that source is not available. In short, however, it can be fairly stated that the United States in *Solem* argued whatever was necessary to resist reservation disestablishment.

Most important for the present case are the concessions of the United States regarding cessions which were adopted in the Court's Opinion. *Solem*, 465 U.S. at 470, 473 n.15, 474, 476, 478. The State addresses these points. State's Br. at 9, 15-16, 26 n.15.

For example, the United States said:

> [*C*]*ritically different* from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1) the relevant legislation contains *no* language of "cession"; (2) there was *no* prior tribal agreement to cede the relevant area. . . .

Br. for the United States as *Amicus Curiae* Supp'ng Resp't (opposing Pet. for Cert.) at 4 n.3, *Solem* (No. 82-1253) (emphasis added).

On the merits, the cession theme was restated with unmistakable clarity:

> The *critical* question remains whether the statute invoked worked an immediate and irrevocable cession. . . .
>
> To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation *must* be

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traditional view that real cessions disestablished reservations. Tribe's Brief at 12, 13 and 16, *Rosebud* (No. 75-562). Counsel for the Rosebud Sioux Tribe has decades of experience in this area of the law. At oral argument, he unequivocally stated:

> A cession is a sale. It is a high-class sale. It is a sale between sovereigns. . . The Court assumed there was a cession. That is the fundamental error of the Court Below.

Transcript of Oral Argument at 12-13, *Rosebud*, 430 U.S. 584.

> found to have been irrevocably terminated or diminished. . . . In the climate of the times, the *only meaningful question* is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.
>
> The *critical* fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment. . . .
>
> [T]he clear line between *outright* cession and mere opening up of tribal lands was not always observed. . . . But we do not read *Rosebud* as erasing the *traditional distinction.*
>
> What is relevant, however, is that, at the end of the day, *no cession resulted.*

BUS, Co. Pet. App. at 103a, 109a, 110a, 111a, 113a, 122a (emphasis added).

In this light, it is not surprising that *Solem* repeatedly made these same cession observations.

6. *United States v. Dion,* 476 U.S. 734 (1986). In order to maintain the cession distinction essential to the argument in *Solem,* the United States had to make similar concessions in other cases then pending. As a result, at about the same time (1984), the United States recognized that cession disestablishment was the dominant factor in the history of the 1858 Yankton reservation and further, that the 1858 Yankton reservation had in fact been *disestablished* by the 1894 Yankton cession act at issue in the present case. Opening Brief for the Federal Appellant at 16, 17 n.10, *United States v. Dion,* 752 F.2d 1261 (8th Cir. 1985). This submission by the United States was made in the Eighth Circuit Court of Appeals sitting *en banc* in conjunction with the appeals of federal prosecutions of Yankton Sioux tribal members and others for unlawfully killing bald eagles, as the United States has acknowledged. Brief for the United States as *Amicus*

Curiae in Support of Plaintiffs-Appellees at 18 n.8, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

In *Dion*, in the opening brief, the United States correctly identified the relationship between the 1858 Yankton cession treaty and the 1894 Yankton cession act under a subheading disputing a treaty "right to hunt eagles to extinction" (one Yankton Sioux tribal member had allegedly killed twenty bald eagles in the course of a year). Opening Brief for the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261; Transcript at 18, 27, *Dion*, 476 U.S. 734. In addition, and in accord with the cession disestablishment submission in *Solem v. Bartlett*, 465 U.S. 463 (1984), the United States specifically cited with approval the controlling federal and state decisions that recognized and held that the 1858 Yankton reservation was disestablished by the 1894 Yankton cession act:

> In 1858, the Yankton Sioux negotiated a treaty with the United States in which they "ceded and relinquished" to the United States all but 400,000 acres of the lands claimed by them. Treaty with the Yankton Sioux, Art. I, 11 Stat. 743. (April 19, 1858)[10] . . . .[10] In 1894, Congress ratified an agreement with the Yankton Sioux which further diminished the size of their reservation. Act of August 15, 1894, § 12, 28 Stat. 286, 314. See *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980); *State v. Williamson*, 211 N.W.2d 184 (S.D. 1973).

Opening Brief of the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261.

The two disestablishment cases cited by the United States are both important. First, in *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), the parties and the federal court proceeded on the basis that the reservation had been disestablished in considering a dependent Indian community jurisdictional claim involving the City of Wagner, South Dakota, which is within the 1858 Yankton

reservation. *See* Brief of Cities at 3-6.[7] In the process of rejecting this dependent Indian community claim to preclude state jurisdiction, in *Weddell* the federal panel, without dissent, specifically noted that the disestablishment issue had been decided and conceded:

> The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell, 636 F.2d at 213 n.2.

Second, in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973), which also involved criminal offenses in the City of Wagner, South Dakota, as well as in the City of Lake Andes, South Dakota (both within the 1858 Yankton reservation), the Supreme Court of the State of South Dakota reiterated and restated its longstanding cession jurisprudence regarding "outright" cessions. Later that same month, the South Dakota Court again confirmed this cession jurisprudence and the disestablished status of a similar cession in *DeCoteau v. Dist. County Ct.*, 211 N.W.2d 843 (S.D. 1973), which was subsequently affirmed by this Court. *DeCoteau*, 420 U.S. 425 (1975).[8]

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[7] The criminal activity in *Weddell* originated in a burglary in Wagner, South Dakota, involving the theft of rifles and shotguns by several Yankton Sioux tribal members and other individuals and the armed takeover of a nearby pork plant. The Supreme Court of South Dakota decided the initial appeals in *State v. Winckler*, 260 N.W.2d 356 (S.D 1977). In the *Winckler* opinion, a unanimous State Supreme Court reiterated that it had previously held the Yankton reservation to be "disestablished" in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973) and further cited *DeCoteau v. Dist. County Ct.*, 211 N.W. 843 (1973), *aff'd*, 420 U.S. 425 (1975). *Winckler*, 260 N.W.2d at 360.

[8] Judge Wollman, a member of the State Supreme Court at the time, concurred specially, noting:

> [T]he Act of 1894, 28 Stat. 286, expresses a congressional determination to terminate the reservation status of the por-

Eight other briefs were filed in the Eighth Circuit Court of Appeals in *Dion*. No one disagreed with the United States' disestablishment assessment of the 1894 Yankton cession act or the controlling federal and state law.

The *en banc* majority opinion in the Eighth Circuit in *Dion* acknowledged this 1894 Yankton cession act disestablishment in the following fashion, and the dissent did not disagree with this conclusion:

> In 1858, the Yankton Sioux and the United States negotiated a treaty in which the Yankton Sioux ceded and relinquished to the United States all lands claimed by the tribe except for a four hundred thousand acre tract of land[7] . . .[7] The Supreme Court of South Dakota has determined that an act of Congress in 1894 diminished the size of the original reservation. *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182, 184 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964). *See Weddell v. Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980).

Dion, 752 F.2d at 1263 & n.7 (8th Cir. 1985) (footnote omitted).[8]

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tion of the reservation ceded, sold, relinquished and conveyed to the United States by the Yankton Tribe.

State v. Williamson, 211 N.W.2d 182, 184 (S.D. 1973). In the instant case, Judge Wollman recused himself.

The United States has now belittled *Williamson* and all state and federal Yankton disestablishment precedent prior to "*Solem* and *Hagen*," without explaining why *Seymour*, *Mattz*, *DeCoteau* and *Rosebud* do not also figure in this equation. Brief for United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 17, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

[8] The *en banc* court supplemented the citations of the United States to the disestablishment cases of *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) and *State v. Williamson*, 211 N.W.2d 182 (1973) with this reference to *Wood v. Jameson*, 130 N.W.2d 95 (1964) (The court of appeals in *Weddell* had also cited *Wood*). In a habeas corpus case, the South Dakota Supreme Court in *Wood* rejected an Indian country claim of federal jurisdiction for a crime of rape that occurred in Lake Andes, South Dakota, which

State v. Williamson, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964) and *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) all make clear that the 1858 Yankton reservation has been disestablished and that references to the present Yankton reservation are limited to the land still held in trust for the Yankton Sioux Tribe or tribal members. *See also DeCoteau*, 420 U.S. at 446. And it was in this light that the Solicitor General admitted in this Court that the "reservation" nature of the violations in *Dion* were "essentially undisputed." Brief for the United States at 15 n.19, *Dion*, 476 U.S. 734. *See also* Respondent's references to "Indian land" and "his reservation." Transcript at 20-21, *Dion*, 476 U.S. 734.

The opinion of this Court in *Dion* noted early on that the Eighth Circuit simply assumed that the birds were killed on the "reservation" and that the same assumption was made in this Court. *Dion*, 476 U.S. at 735 & n.1. With this assumption, a unanimous Court did not otherwise directly or specifically address the 1894 Yankton cession act issue. However, in the course of discussing the history of the 1858 Yankton reservation, the Court in *Dion* did cite *Wood* in the text of the opinion, in recognition of the fact that the area reserved in 1858 was initially a "legally constituted Indian reservation." *Dion*, 476 U.S. at 737 (citing *Wood*, 130 N.W.2d 95). *See* discussion of *Wood supra* at Note 9. On the very same page in *Wood* that recognized the initial legitimacy of the 1858 Yankton reservation, the *Wood* opinion begins its

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is within the 1858 Yankton reservation. *Wood*, 113 N.W.2d 95. The *Wood* court, citing numerous state court decisions, distinguished *Seymour v. Superintendent*, 368 U.S. 351 (1962) (as this Court did later in *DeCoteau*) on the basis of the nature of this outright 1894 cession. *Wood v. Jameson*, 130 N.W.2d at 98-99. The *Wood* court also relied on this Court's venerable precedent in *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v United States*, 232 U.S. 478 (1914) (liquor provision to apply "on or off a reservation") and concluded that the "purpose" of Congress was to "disestablish the reservation." *Wood v. Jameson*, 130 N.W.2d at 97-99. See also discussion of *Perrin* in State's Br. at 33.

discussion of the disestablishment of the 1858 Yankton reservation occasioned by the passage of the 1894 Yankton cession act (two sentences later). *Wood*, 130 N.W. 2d at 97. As noted above, the *Wood* analysis included quotations of the cession language of the 1894 cession act and early precedent of this Court, such as *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v. United States*, 232 U.S. 478 (1914). *Wood*, 130 N.W. 2d at 97-99. Because the Eighth Circuit in *Dion* expressly cited *Wood* for this disestablishment holding, the reference to *Wood* in this Court's opinion should be viewed in this light.

One final point with respect to the views of the United States in *Dion* regarding the 1858 Yankton treaty, the 1894 Yankton cession act and subsequent acts of Congress. Apart from the previous inconsistent disestablishment concession of the United States with reference to the 1894 Yankton cession act (and all other cessions), the strained argument the United States now submits should also be examined in the context of the views the United States expressed in *Dion* regarding statutory construction and Indian treaties generally. For example:

> [T]he general circumstances of treaty negotiation in the nineteenth century which, in our view, would not have led any of the parties even to form an intention on this issue. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), the Supreme Court emphasized that treaties with the Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." The historical context of Indian treaty negotiation demonstrates that neither the United States nor the Indian signatories ever contemplated. . . .

Opening Brief for the Federal Appellant at 17-18, *Dion*, 752 F.2d 1261.

> This Court has emphasized that Indian treaties 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the

> assumptions of those who drafted them.' *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206 (1978).

Brief for the United States at 19, *Dion,* 476 U.S. 734.

> It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, *e.g., Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 118 (1983).

Reply Brief of the United States at 7, *Dion,* 476 U.S. 734.

> The statute should be construed in order to effectuate its purposes.

Transcript at 17, *Dion,* 476 U.S. 734.

These are important concepts. Their significance is not undermined here simply because the United States now chooses to advance an argument that is at odds with acknowledged congressional assumptions and overall congressional purposes.

7. *Yankton Sioux Tribe v. South Dakota,* 796 F.2d 241 (8th Cir. 1986), *cert. denied,* 483 U.S. 1005 (1986). Apart from *Dion,* the United States has only had one opportunity since *DeCoteau* (but before the present litigation) to tell this Court specifically about the *Yankton* statute and how it compared to the *DeCoteau* statute. In that instance, involving a lakebed, the cession comparison is also telling:

> [T]he United States' right to control Lakes Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement. . . . First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe,* No. 83-2148 (July 2, 1985), slip op. at 15 n.19; *Solem v. Bartlett,* 465 U.S. 463, 469 (1984). In *DeCoteau v. District County Court,* 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering *a similar and contemporaneous cession* agreement, found that *the same language* was "precisely suited" to the purpose

> of conveying to the United States, "for a sum certain, *all of* [*the Indians'*] interest in *all* of their unallotted lands."
>
> Second, the retention of the lakebed by the Tribe would have been inconsistent with the *purposes* of the 1892 Cession Agreement. Those *purposes* consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. . . .

BUS, Co. Pet. App. at 165a, 166a (emphasis on all in original).

While it remains to be seen exactly what the United States might tell this Court now, the County would submit that in this excerpt in the 1986 Brief in Opposition, the United States has already said everything worth saying ("a similar and contemporaneous cession"). This *Yankton* lakebed litigation was pending for over a decade. Although reservation disestablishment was not decided, the Yankton cession agreement was central to the arguments for the United States and other parties. As such, it was thoroughly reviewed and discussed in all respects. At that time, Article XVIII of the Yankton agreement, viewed in context, was not noteworthy and did not even merit special attention in the argument of the United States.

Not surprisingly, the position of the United States on this issue was subsequently modified to one that now supports the recognition of the original Yankton reservation. In the court of appeals, Article XVIII figured prominently in the new argument.

8. *Hagen v. Utah*, 510 U.S. 399 (1994). *Hagen* reflects the most recent views of this Court in resolving disestablishment issues. Due to the history of the Utah legislation, the United States devoted most of its arguments in *Hagen*—naturally in favor of a recognition of original reservation boundaries—to "public domain" terminology. These arguments were generally rejected in *DeCoteau*. Again, in *Hagen* this Court squarely rejected them.

The United States also strongly argued that a cession and sum certain agreement was broadly understood to effect disestablishment:

> Language that "[e]xplicit[ly] refer[s] to *cession*" or otherwise "evidence[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress *meant to sever it* from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."[14] [14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau v. District County Court*, 420 U.S. 425, 431-449 (1975).
>
> But the statute at issue in *Rosebud* contained explicit language of *cession*. . . .
>
> That language does not refer to a "*cession*" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened land. . . . [C]ontrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted." Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. *Accordingly*, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries. . . . [L]an-

> guage demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation. . . . Act does not refer to any *cession*. . . .
>
> As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used *unequivocal language of cession*, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). . . .
>
> [N]one of the relevant documents . . . uses the *indisputable language of cession* that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the *requirement* in *Solem* that the "understanding" be "widely held" requires *proof* that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the *only* obvious manifestation of such an understanding on the part of the Indians is *an agreement of cession*, like the one approved in *Rosebud*.

BUS, Co. Pet. App. at 138a, 141a n.20, 142a, 143a, 149a, 150a (emphasis added).

Significantly, in this instance the United States also participated in oral argument and made explicit representations as to the effect of the use of cession language:

> MR. MANN: . . . [*T*]*he language of cession*. That seems to be—that phrase seems to be the phrase *Congress used when it intended to alter the boundaries of a reservation*.
>
> QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear.

Tr. at 26, *Hagen* (No. 92-6281).

The County certainly would not attempt to improve upon the gist of this exchange. Nothing more need be said on this point.

9. *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996). The United States did not participate in this litigation in the district court. In the court of appeals, the United States, as *amicus curiae*, told the court that because the federal government retains jurisdiction over Indian country generally, the continuing integrity of the exterior boundaries of Indian reservations is of "significant import." Br. of the United States at 1, *Yankton Sioux v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). (The United States did not contest the fact that federal jurisdiction had *not* been exercised in this area for over a century).

Moreover, the United States argued, for the first time, that it had a strong interest in protecting "the integrity of reservation boundaries" because of its "special relationship with Indian tribes." *Id.* The strength of this interest presumably overpowered any inclination to present, address, explain or defend any of the previous United States' cession arguments that were plainly inconsistent with continued reservation status, including the *Dion* disestablishment concession. The United States mentioned none of this and simply noted: "We do not agree with the arguments raised by the County in its brief. They are irrelevant to this case." *Id.* at 19 n.11.[10]

Only two points in the novel argument now advanced by the United States in support of original reservation boundaries are significant at this point in time. First, the commendable concession that this Court's 1914 Yankton decision in *Perrin v. United States*, 232 U.S. 478 (1914), "assumed" disestablishment. *Id.* at 19 n.10. And secondly,

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[10] At oral argument in the companion case of *United States v. Greger*, 98 F.3d 1080 (8th Cir. 1996), the United States glossed over the 1894 cession act because, unlike the act in *Hagen*, it did not contain probative public domain language on its face. In *Hagen*, the premise of the argument of the United States was just exactly the reverse: public domain language was meaningless, cession language would have been dispositive. *See* text at 28, *supra*.

that as late as 1985 the United States (and everyone else) was continuing to make this same assumption:

> [T]he United States stated in a footnote in its brief that, based on decisions of state courts in South Dakota, the reservation had been diminished by the 1894 treaty.

Id. at 18 n.8.

The panel majority should have been more reluctant in disregarding this venerable precedent.[11]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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[11] Another generic argument that the United States has endorsed and submitted in litigation of this kind promises even more unsettling consequences than the simple reversal of the position of the United States in regard to the 1894 Yankton cession statute. (In light of this Court's precedent, the County has every reason to believe that this Court will squarely reject the revised Yankton cession views of the United States in this case). But the new argument of the United States, submitted subsequent to *Hagen* in the Tenth Circuit and now in the Eighth Circuit Court of Appeals, summarily undermines the effect of all disestablishment precedent on reservation boundaries and would leave local jurisdictions such as Charles Mix County in almost impossible situations.

Because it is beyond the scope of this brief, others have addressed the decisions that recently endorsed this position. *See Ute Indian Tribe v. State of Utah*, 935 F. Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet. *See* Brief of Duchesne County, Utah, and Uintah County, Utah *Amici Curiae*. The County has reproduced the argument itself as the United States submitted it in Co. App. at 1a, *infra*.

Respectfully submitted,

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Dated: August 7, 1997

Excerpt from Page 17 (Footnote 6) From Brief for United States as Amicus Curiae in Support of Plaintiff's-Appellee's, Yankton-Sioux Tribe v. Southern Missouri Waste Management Dept., 99 F. 3d 1439 (8th Cir. 1997) (95-2647).

* * * *

Article I of the 1892 Agreement provides only that "the unallotted lands within the limits the [Yankton Sioux] reservation" are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unalloted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership were removed from the Reservation. The State's argument in this case, therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see Solen*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

* * * *

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 8 Misc.

PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT
OF WASHINGTON STATE PENITENTIARY

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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MEMORANDUM FOR THE UNITED STATES

The Court has requested the view of the United States as to whether the lands involved in the above-entitled case are Indian lands.

The record in this case shows the land involved as follows:

> On the southwest corner of 6th Avenue and Jackson Street (formerly 10th Street) in East Omak, Okewogan County, Washington; that said premises are more particularly described as Lot 9, Block 118 of the government townsite of Omak and situated in Section 36, Township 34, North Range, 26 E.N.M.

According to the records of the Department of Interior, this land is not held in a trust status for any Indian nor is it held by an Indian subject to restrictions against alienation. Nevertheless, it is the position of the Department of Interor, with which the Department of Justice agrees, that the land is "Indian country" as that term is defined in 18 U.S.C. 1151.

18 U.S.C. 1151 provides in pertinent part that Indian country means "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The land here is, in our view, "within the limits" of an Indian reservation.

The Colville Reservation, as originally established by executive order in 1872, was bounded on the north by the international boundary and on the south by the Columbia River. See Royce, *Indian Land Cessions in the United States*, Washington Map 1, No. 536. That part of the original reservation approximating the north half was ceded to the United States and the reservation was diminished to approximately the south half in 1892. See Royce, *op cit.*, Washington Map 2, No. 717. While it is true that the Act of March 22, 1906, 34 Stat. 80, made provision for allotments on the diminished reservation and authorized the sale and disposition of the unallotted lands subject to payment of the proceeds of the sales to the Indians, this did not destroy the existence of the reservation. The Department of Interior continued to recognize the entire diminished or "south half" as the Colville Reservation. The Act of July 24, 1956, 70 Stat. 626, specifically provides in section 1 that "the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject

to any existing valid rights." Section 2 of that Act, authorizing exchanges to effect land consolidation between Indians and non-Indians in Okawogen County, provides that the "acquisition of lands pursuant to this Act shall be limited to lands within the boundary of the reservation." This seems a clear recognition by Congress that lands opened under the Act of 1906 are still within the existing boundaries of the Colville Reservation.

Since it is the boundaries of the reservation, rather than the fee title to the property, which is controlling under 18 U.S.C. 1151, the land in issue seems to us to be in "Indian Country." Hence, under 18 U.S.C. 1153, the crime of burglary would be punishable by the United States, and not the state.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATZ, PETITIONER

v.

G. RAYMOND ARNETT

On Writ of Certiorari to the
California Court of Appeal, First District

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review (Pet. App. C) was entered on December 16, 1971. The opinion of the Court of Appeal, First District (Pet. App. A), is reported at 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

JURISDICTION

On December 16, 1971, the Supreme Court of California denied petitioner's application for review. A petition for a writ of certiorari was filed with this Court on March 14, 1972, and was granted on January 15,

1973. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

EXECUTIVE ORDER AND STATUTES INVOLVED

The Executive Order of October 16, 1891, I. Kappler, *Laws and Treaties* 815 (1904), reads as follows:

> EXECUTIVE MANSION OCTOBER 16, 1891
>
> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON.

The Act of June 17, 1892, 27 Stat. 52, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided,* That any Indian now located upon said reservation may, at

any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,* That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within

which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided,* That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further,* That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 17, 1892. [Bold type shows language added by Senate amendment of House bill.]

18 U.S.C. 1151 reads as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1162 provides in relevant part:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses

committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
* * * *	
California	All Indian country within the State.
* * * *	

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * * or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof.

The California Fish and Game Code, Section 12300, reads as follows:

Irrespective of any other provisions of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

QUESTION PRESENTED

Whether petitioner's fishing nets were seized by the State of California within Indian country as defined by 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94).[1]

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

This action was brought by the respondent, director of the state Department of Fish and Game, for the forfeiture of five nylon gill nets owned by the petitioner on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on September 24, 1969. The nets were stored in open containers upon land owned by a lumber company within 200 feet of the Klamath River on land that had once been part of the Klamath River Reservation and that had been made part of the Hoopa Valley Reservation by Executive Order in 1891 (Pet. App. A, p. 1; Pet. App. B, pp. 4-5).

The petitioner intervened to resist the forfeiture alleging that he is an enrolled Indian of the Yurok (Klamath River) Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable.

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[1] Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which either are preserved from state regulation by 18 U.S.C. 1162(b), *supra*, or entitle him to the exemption of California Fish and Game Code, Section 12300, *supra*. See Pet. App. A, pp. 1-2.

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 and was not within an Indian reservation within the meaning of California Fish and Game Code, Section 12300, because the Act of June 17, 1892, which had opened the Reservation for public purchase of excess land had, in effect, terminated the twenty miles of the reservation nearest to the Pacific Ocean (Pet. App. B, pp. 1-2). The state Court of Appeal affirmed the decision on the same grounds (Pet. App. A), and the Supreme Court of California denied petitioner's application for review (Pet. App. C). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on January 15, 1973.

SUMMARY OF ARGUMENT

I. The events leading to the Act of June 17, 1892, show that the Act did not terminate the portion of the Hoopa Valley Reservation to which it applied. The seaward twenty miles of the addition to the Hoopa Valley Reservation had been the Klamath River Reservation. Because of legal problems in maintaining multiple separate reservations, the President, by Executive Order in 1891, had made the Klamath River Reservation part of the Hoopa Valley Reservation. The reference in the 1892 act to "what was the Klamath River Reservation" merely designates the portion of the addition to the Hoopa Valley Reservation that had previously been a separate reservation. It does not indicate a congressional abolition of half of the just created Hoopa addition.

The Act of 1892 can properly be understood only in light of the General Allotment Act which Congress had recently passed. In that Act Congress maintained Indian reservations but permitted allotments of land within reservations to individual Indians and sales of surplus land to non-Indians. The General Allotment Act, however, did not require the President to make allotments within any particular reservation. Consequently a number of Acts

requiring allotments and disposal of surplus land within particular reservations were passed. The 1892 Act was such an Act. Nothing in the Act purports to terminate the part of the reservation to which it applies. When Congress has wished to terminate all or part of a reservation it has done so explicitly.

II. The consistent course of administrative and congressional action subsequent to the Act of 1892 supports the proposition that that Act did not abolish the Klamath River portion of the Reservation. The Department of the Interior, shortly after the passage of the Act, was required to determine whether allotments made under the Act were allotments on or off a reservation. In a carefully reasoned and documented opinion the Department in charge of administering the Act ruled that the Act reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. This has been the consistent view of the Department of the Interior, and has also been the premise on which Congress has subsequently acted.

III. The decisions of this Court has consistently held that Acts opening reservations or parts of reservations for allotment and disposal of surplus land for the benefit of the resident Indians do not thereby abolish the reservations. *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The Act of 1906 in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. This Court held that that statute, while requiring allotment and disposal of surplus land in the Colville Reservation, did not thereby terminate the Reservation. Moreover, although one of the primary purposes of the extension of the Hoopa Valley Reservation was to secure the Indians' fishing rights in the Klamath River, nothing in the 1892 Act purported to terminate those rights. An intent to take such rights without compensation merely by implication should not be presumed.

ARGUMENT

I. THE EVENTS LEADING TO THE ACT OF JUNE 17, 1892, 27 STAT. 52, AND THE ACT ITSELF SHOW THAT THE ACT DID NOT TERMINATE THE ADDITION TO THE HOOPA VALLEY RESERVATION CREATED BY EXECUTIVE ORDER ONLY MONTHS BEFORE, ON OCTOBER 16, 1891

A. The History of the Establishment of the Reservation

The Yurok Indians historically have been fishing people who live on the lower Klamath River near the Pacific Ocean, the area in question here. See Kroeber, *Handbook of the Indians of California*, p. 1 (1925).[2] Their very name means "downstream" in the language of the adjacent Karok Tribe. Kroeber, *supra*, at p. 15.

On November 16, 1855, as authorized by the Act of March 3, 1855 (10 Stat. 686, 699), President Pierce set apart as an Indian reservation a strip of territory extending along the Klamath River for a width of one mile on each side for a distance of twenty miles inland from the Pacific Ocean. The area is a deep gorge, consisting of craggy timberland rich in redwood and pine with little arable land except at the river bank. The area was chosen because the Indians had always lived there and had depended largely on fish from the Klamath River for their diet and trade.[3]

In his 1861 Annual Report (quoted in 33 I.D. at 216) the Commissioner of Indian Affairs described the Reservation as follows:

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[2] There are excerpts from Kroeber at A. 34-44.

[3] See 1858 Annual Report of the Commissioner of Indian Affairs, p. 286, quoted in *Crichton* v. *Shelton*, 33 Decisions of the Department of the Interior (I.D.) 205, 216. See also 33 I.D. at 205-206.

> This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians.

In 1861 the Klamath river flooded and destroyed many of the Indian villages. This led the Interior Department to attempt a temporary relocation of the Yurok and other Klamath River Indians to a reservation on the Smith River, but few left and most of those soon returned.[4] The Smith River reservation was thereafter abolished.[5]

In 1864 the Hoopa Valley Reservation, a 12-mile square about 50 miles inland from the mouth of the Klamath River, was created by administrative order authorized by the Act of April 8, 1864 (13 Stat. 39) (later confirmed by Executive Order of June 23, 1876, I Kappler, *supra*, at p. 815). Its creation inadvertently cast doubt on the continued *legality* of the Klamath River reservation (not on its occupation or use by Indians). This was so because the Act of April 8, 1864, *supra*, which authorized the President to create new Indian reservations within California, limited the number of new and old reservations to four, and, arguably, the President had exceeded that number. Indeed, in 1889 the Circuit Court for the Northern District of California ruled that because of the President's failure to list the Klamath River Reservation as one of the four, it was no longer legally a reservation. *United States* v. *Forty-Eight Pounds of Rising Star Tea*, 38 Fed. 400.

It was in response to this decision that, in order to preserve the Klamath River Reservation, President Harrison issued the Executive Order of October 16, 1891 (p. 2, *supra*) extending the Hoopa Valley Reservation to

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[4] See *Crichton, supra*, 3 I.D. at 208.

[5] Act of July 27, 1868, 15 Stat. 198, 221.

the sea in a strip one-mile wide on each side of the Klamath River so as to include the former Klamath River Reservation. In *Donnelly* v. *United States*, 228 U.S. 243, this Court upheld the validity of the 1891 Executive Order extending the Hoopa Reservation to the sea.[6]

B. The Act of June 17, 1892 and the General Allotment Act

In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the General Allotment Act (Act of February 8, 1887, 24 Stat. 388) and (2) the changes made in the 1892 Act during the legislative process in order to incorporate Allotment Act provisions in it.

1. By the 1880's and 1890's the Indians in the West had given up vast areas of land, but they still had substantial holdings in the form of reservations, created by treaty, executive order, or statute. During this period there was much pressure on Congress to remove land from these reservations and make it available for settlement and exploitation by non-Indians. But there was also considerable feeling that to do so would violate treaties and generally break faith with the Indians who had been induced to give up larger areas of land and to become peaceful in return for federal protection and the reservations created for them. The General Allotment Act of 1887 was to some extent a congressional compromise of these conflicting pressures and considerations.

The policy of the Act was to continue the reservation system and the trust status of Indian land at least for

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[6] *Donnelly* concerned a crime committed within the "connecting strip" joining the former Hoopa and Klamath River Reservations. The Court consequently did not specifically consider the effect of the Act of 1892. However, it characterized it as "opening" that part of the reservation to "settlement, entry and purchase," 228 U.S. at 253, not as terminating or abolishing it.

the time being, but to allot individual tracts to Indians (in trust) which they would be encouraged to farm. When all the land had been allotted and the trusts had expired, the reservation could be abolished.[7] In the meantime, since acreage limitations were put on the allottments, there would usually be surplus land within reservations which could be made available to non-Indians. It was hoped that the resulting juxtaposition of the two races would be edifying to the Indians and encourage them to adopt white ways.[8]

While the General Allotment Act thus permitted the President to make allotments of reservations lands and, with tribal consent, to sell surplus lands, it did not require him to do so. Congress, therefore, occasionally enacted special legislation to assure that a particular reservation would be opened for allotment and non-Indian settlement. The Act of June 17, 1892, at issue in this case, is an example of such legislation.[9]

Because of the General Allotment Act and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra*, however, allotments to Indians and sales to non-Indians, whether under the General Allotment Act or special Acts, do not in themselves terminate the reservations or even make the lands therein held by non-Indians cease to be Indian country. *Seymour* v. *Superintendent*, 368 U.S. 351, 357-359; *Ellis* v. *Page*, 351 F.2d 250 (C.A. 10); *State* v. *Molash*, 199 N.W. 2d 591 (Sup. Ct. S.D.).

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[7] The original trust period was to be 25 years, but those periods have often been extended. See p. 21, *infra*.

[8] See, generally, United States Department of the Interior, Federal Indian Law, pp. 115-117, 127-129, 776-777 (1958).

[9] The policy of allotment and sale of surplus lands within reservations was repudiated in the Indian Reorganization Act of 1934, 48 Stat. 984 *et seq.*, as amended, 25 U.S.C. 461 *et seq.*

2. The pressures of non-Indians to obtain some of the land and especially the redwood forests within the Klamath River Reservation were particularly strong. In 1879, at the request of the Department of the Interior, military forces were used to evict trespassers. Thereafter, the Secretary decided in 1883 to make allotments to Indians living on the reservation, but he revoked the decision because of inadequate surveys and nothing further was done at that time to make allotments or authorize white settlement.[10] In October 1891, the President reaffirmed the existence of the reservation by his Executive Order incorporating it into an extension of the Hoopa Valley Reservation (see p. 2, *supra*).

House Bill, H.R. 38, 52d Cong., 1st Sess., which after amendment became the Act of 1892 at issue here, was reported out of committee on February 5, 1892[11] and was passed by the House on March 1, 1892,[12] only months after the President had reaffirmed the existence of the reservation. The apparent purpose of the House Bill[13] was to seek to open the reservation to non-Indian interests without raising too much opposition. Its language did not purport to terminate the Reservation (the Hoopa extension) just created by the President, and it did not purport to "diminish" the Reservation. Nor did it call for the removal of the Indians.

The bill first designates, as the area to which it applied, what was "Klamath River Reservation"—thus only the seaward portion of the just created extension of the Hoopa Valley Reservation. The bill opened the designated

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[10] See Annual Report of the Commissioner of Indian Affairs for 1885, quoted in part in *Crichton*, *supra*, 33 I.D. at 214.

[11] H. Rept. No. 161, 52d Cong., 1st Sess.

[12] 23 Cong. Rec. 1598-1599.

[13] At pages 2-3, *supra*, we have set forth the 1892 Act with the House language in normal type and the language added by the Senate in bold type.

portion of the Reservation for settlement under the homestead, mineral and timber laws. However, it recognized that there were both Indian villages and settlements within that part of the reservation and authorized the Secretary of the Interior to set those apart for permanent use by the Indians. The bill provided for confirmation of title for non-Indians who had settled on reservation land not constituting Indian villages or communities, and specified that the funds derived from the sale of the land "shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children." The House bill thus recognized a continuing Indian community and a continuing federal responsibility for Indians living in this portion of the reservation.

The Senate, however, was not satisfied that the House bill adequately protected Indian interests; it amended the bill and called for a conference with the House. 23 Cong. Rec. 3918-3919. As a result of the Senate amendment, the first two provisos of the Act were added (see p. 3, *supra*, bold type). In these provisos the area in question is referred to as a "reservation" and "any Indian now located upon said reservation" is permitted to "apply to the Secretary of the Interior for an allotment of land for himself and * * * for the members of his family, under the provisions of * * * [the General Allotment Act]." In other words, the Senate, dissatisfied with the House bill, which would have allowed non-Indian settlement without first providing for Indian allotments, brought the Act into line with the General Allotment Act, with the difference that Congress ordered the opening rather than leaving it to the President with the consent of the Indians.[14]

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[14] Senator Dawes, the author of the General Allotment Act, sat on the Conference Committee. See 32 Cong. Rec. 3919. Because the House bill was significantly amended in the Senate and in the Conference Committee before it was enacted, respondent errs in

Nothing in the Act, or even in the House bill, purports to abolish the Reservation. The reference in the Act to "what was the Klamath River Reservation" merely identifies the part of the extension of the Hoopa Valley Reservation to which the Act applied (see p. 15, *supra*). The court below erred in relying on this descriptive designation as indicating abolition of the Reservation. When Congress has wished to abolish an Indian reservation, it has used direct and unambiguous language to accomplish that purpose. For example, when Congress abolished the nearby Smith River Reservation it stated: [T]he Smith River reservation is hereby discontinued." 15 Stat. 221. And when several Oklahoma Reservations were abolished, the tribes agreed to "'cede, convey, transfer, relinquish, and surrender, foreover and absolutely, without any reservation' all their claim in and to the lands embraced within the designated reservation." *Ellis* v. *Page*, 351 F.2d 250, 252 (C.A. 10).

In another example, Congress specified:

> [T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished. 33 Stat. 218.

See also 68 State. 250 (providing for the abolition of the Menominee Reservation): *State* v. *Molash*, 199 N.W.

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relying (Br. pp. 5-7) on statements in the House Report accompanying that bill which do not reflect the amendments designed to protect the interests of Indians living on the Reservation. Those amendments are inconsistent with the statements in the House Report (and with isolated similar statements by individuals during the floor debates) that the Klamath River area was no longer being used as a reservation—a statement as to which the Department of the Interior later declared "the committee was apparently mistaken * * *" (*Crichton*, *supra*, 33 I.D. at 214). Moreover, although the House Report is dated more than 5 months after the Executive Order establishing the extension of the Hoopa Valley Reservation (see p. 15, *supra*), it makes no mention of this highly significant Presidential action affecting the land and people in question.

2d, 591 (Sup. Ct. S.D.); *Leech Lake Band* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.)

The contrast of these statutory provisions with the Act at issue here is highly significant—particularly in light of the 1892 Act's provisions recognizing that Indians individually and in villages and communities would continue to live in the area and would continue to be under federal protection (see p. 4, *supra*).[15]

And there is nothing in the Act suggesting any loss of fishing rights for the Indian residents of the area or diminution of federal jurisdiction over the area.

II. THE CONSISTENT COURSE OF ADMINISTRATIVE AND CONGRESSIONAL ACTION SUBSEQUENT TO THE ACT OF JUNE 17, 1892, SUPPORTS THE PROPOSITION THAT THE ACT DID NOT ABOLISH THE KLAMATH RIVER PORTION OF THE 1891 EXTENSION OF THE HOOPA VALLEY RESERVATION

Interpretation of a law by the government agency responsible to administer it is entitled to great weight.

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[15] In 1893, pursuant to the 1892 Act and the General Allotment Act, 161 allotments were granted to Indians residing on the Klamath River part of the Hoopa Extension, thus demonstrating a sizeable Indian community at the time the Act was passed. These allotments averaged 60 acres each, totaling 9,762 acres, 40% of the approximately 25,000 acres of the part of the reservation opened for settlement. Finding of Fact No. 83, p. 57, Report of Commissioner in *Jessie Short, et al.* v. *United States*, C.Cls. No. 102-63. At the trial of the present case evidence was submitted showing that petitioner's mother holds such an allotment and that his fishing was in the close vicinity of that allotment (A. 28-31).

In *Jessie Short*, pending in the United States Court of Claims, the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.

Griggs v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16. The consistent course of administrative interpretation by the Department of the Interior has been, and remains, that the Klamath River Reservation was not abolished by the 1892 Act and still survives.

In 1904 the Department of the Interior was required to rule on whether an allotment made in the Klamath River Reservation portion of the Hoopa Extension under the Act of June 17, 1892, was an allotment within an Indian reservation or outside a reservation. *Crichton* v. *Shelton*, 33 I.D. 205. The question of the survival of the Reservation after the 1892 Act was squarely presented. In a carefully reasoned and fully documented opinion, the Department ruled that the challenged allotments were allotments on a reservation, and that the 1892 Act, in authorizing such allotments, reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. 33 I.D. at 219-220. This contemporaneous interpretation of the 1892 Act was rendered, not by the Bureau of Indian Affairs, but by the Department of the Interior—the Department charged with administering the Act both as to Indians (through the Bureau of Indian Affairs), and as to non-Indian settlers (through the Land Office).

The opinion is significant not only for its holding, but also for the thorough factual and historical background it set forth at a time when the events were less remote. Of particular importance here is the opinion's carefully documented statement that (33 I.D. at 217):

> * * * the lands within the reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians [occupying them]. There is little question that the prevailing motive for setting apart the reservation was to secure

to the Indians the fishing privileges of the Klamath River . * * *

Testimony at a congressional hearing held in 1932 [16] confirms that the Department of the Interior still considered the seaward twenty miles of the Klamath River to be an Indian reservation. O. M. Boggess, Superintendent (for 12 years) of the Department's Hoopa Indian Agency, in a statement taken at Hoopa California, September 24, 1932, testified (A. 14):

> Mr. BOGGESS. This reservation is 12 miles square and then there is an extension 1 mile on each side for an aditional 50 miles down the Klamath River to the east [sic] coast.
>
> Senator FRAZIER. Is it all connected?
>
> Mr. BOGGESS. Yes; and it is all classed by the Indian Office as one reservation.
>
> Senator FRAZIER. What do they call this reservation?
>
> Mr. BOGGESS. They call it the Hoopa, and the mile strips they call the Klamath.

The Department of the Interior today administers the entire 1891 extension to the Hoopa Valley Reservation as an Indian reservation. See note 15, *supra*.[17]

Moreover, after it authorized entry to surplus lands in the 1892 Act, Congress also continued to treat the Klamath River Reservation as an existing reservation. Indians had continued to live on this part of the Hoopa Extension (as they do today), but the trust period on their allotments had expired in 1919. Instead of considering its responsibilities terminated in this area, Con-

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[16] 72d Congress, *Survey of Conditions of the Indians in the United States*, Part 29, California, U.S. Printing Office 1934. See A. 12-16.

[17] See, also, map of Indian Land Areas published by the Department of the Interior in 1971, which we have lodged with the Clerk of this Court.

gress in the Act of December 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a, extended "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *," reimposing "the trust on certain lands allotted to Indians of the Klamath River Reservation, California." And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of-ceded lands * * * on the following named Indian reservations * * * : Klamath River, California * * *." Compare *Seymour* v. *Superintendent*, 368 U.S. 351, 356.

III. THIS COURT'S DECISIONS INDICATE THAT THE FOREGOING CONSIDERATIONS ESTABLISH THE CONTINUED EXISTENCE OF THE RESERVATION

1. The Act of June 17, 1892, is only one of many Acts which between 1887 and approximately 1913 opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians.[18] These Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. The question whether such Acts make either land allotted to Indians or land patented to non-Indians no longer

[18] See, *e.g.*, Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), *United States* v. *Nice*, 241 U.S. 591; Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), *Seymour* v. *Superintendent*, 368 U.S. 351; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River Reservation), *United States ex rel. Condon* v. *Erickson*, 344 F. Supp. 777 (D. S.D.); Act of June 1, 1910, 36 Stat. 455 (Fort Berthold Reservation), *The City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); Act of February 14, 1913, 37 Stat. 675 (Standing Rock Reservation), *State* v. *Molash*, 199 N.W.2d 591 (Sup. Ct. S.D.).

Indian country has been before the courts many times and has been addressed by Congress in defining Indian country in 18 U.S.C. 1151, pp. 4-5, *supra*. Both before and after the enactment of 18 U.S.C. 1151, this Court has consistently held that neither allotment nor sale of land within a reservation terminates the reservation.

In *United States* v. *Celestine*, 215 U.S. 278, the Court had to decide whether various patents of land made within a reservation precluded federal jurisdiction over a murder that might have occurred on patented land. The Court held (*id.* at 284):

> That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

The general principles stated by the Court was that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. The Court held that the patenting of allotments on the reservation to individual Indians did not constitute such separation and did not terminate the reservation.

Several years later in *United States* v. *Nice*, 241 U.S. 591, the Court was called upon to interpret the Act of March 2, 1889, 25 Stat. 888, which, similarly to the Act at issue here, required allotments to be made within various Sioux reservations in accordance with the General Allotment Act and which authorized the Secretary of the Interior, with the consent of the tribe, to sell surplus land after the allotments had been made. The Court held that this Act did not terminate the reservation, since both the

General Allotment Act and the Act in question "disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relations of Indians having allotments under the Act was recognized during the trust period as still continuing." 241 U.S. at 596-597. See also *Wilbur* v. *United States*, 281 U.S. 206.

This Court's more recent decision in *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The 1906 Act in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. That Act (1) provided for allotments to Indians under the provisions of the General Allotment Act (Sec. 2); (2) required that surplus land be made available for homesteading (Sec. 3); (3) required that surplus land not settled by homestead be sold at auction (*ibid.*); and (4) provided that the proceeds received from homesteading and sale be used for the benefit of the Indians remaining on the reservation (Sec. 6). In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservation or "restoring that land to the public domain" (368 U.S. at 355) and the Act's requirement that the proceeds of sales of the land be used for the benefit of the Indians (*id.* at 355-356). The Court also relied on the subsequent interpretation of the Act by the Department of the Interior (*id.* at 357) and the subsequent congressional restoration to the tribe of undisposed of lands within the reservation (*id.* at 356).[19] All of these factors, which were con-

[19] The Court in *Seymour* also rejected the State's alternative contention that the reservation, if not totally abolished, had at least been diminished to the extent of actual purchases of lands within it by non-Indians. The Court held this contention inconsistent with the definition of Indian country in 18 U.S.C. 1151 as including " 'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *.' " 368 U.S. at 357-358.

trolling in *Seymour*, are also present, and equally controlling, here.

2. We note also that no mention is made in the Act of June 17, 1892, of depriving the Indians of the Hoopa Valley Reservation Extension of either their ownership of the river bed or their fishing rights.[20]

In *Donnelly* v. *United States*, 228 U.S. 243, 259, this Court held that the river bed was part of that Reservation and emphasized the importance of fishing to Indian life as follows:

> Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed,[21] a reasonable construction of *this language requires that the river be considered as included within the reservation.* Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river. *As a mater of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.* The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described

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[20] After extensive hearings in 1964 the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S. J. Res. 170 and S. J. Res. 171, 88th Cong., 2d Sess. And Congress in 18 U.S.C. 1162(b) (p. 5, *supra*) in granting criminal and civil jurisdiction over Indian country to certain States specifically excepted federally protected fishing rights.

[21] The Court held that it was. *Id.* at 264.

> as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. [Emphasis added.]

See also *Metlakatla Indians* v. *Egan*, 369 U.S. 45; *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620.

The obvious intent of specifically including the riverbed and shore in the Hoopa Extension (Executive Order of October 16, 1891) was to protect the right of the Indians to fish. Nothing in the Act of 1892 purported to terminate the Tribes' ownership of the riverbed or their fishing rights. An intent to take such rights without compensation merely by implication should not be presumed. *Menominee Tribe* v. *United States*, 391 U.S. 404. See also *Kennerly* v. *District Court of Montana*, 400 U.S. 423.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for determination of the issues not reached by the courts below.

Respectfully submitted.

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MARCH 1973.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1148

IN THE MATTER OF THE APPLICATION OF
CHERYL SPIDER DECOTEAU, PETITIONER

v.

THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT

On Writ of Certiorari to the
Supreme Court of South Dakota

No. 73-1500

DON R. ERICKSON, WARDEN, SOUTH DAKOTA
STATE PENITENTIARY, PETITIONER

v.

JOHN LEE FEATHER, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Act of March 3, 1891, opening land within the Lake Traverse Indian Reservation to non-Indian settlement, granted the State of South Dakota criminal and domestic relations jurisdiction over members of the Sisseton,Wahpeton Sioux Tribe with respect to acts done on such land patented to non-Indians.[1]

TREATY AND STATUTE INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, is set forth in the Brief for Petitioner in *DeCoteau* at App. 1-6.

The pertinent provisions of the Act of March 3, 1891, 26 Stat. 989, are set forth in the Brief for Petitioner in *DeCoteau* at App. 7-15.

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau* v. *The District County Court*, and expresses the views of the United States in the closely related case of *Erickson* v. *Feather*, *certiorari* was granted in both cases on June 3, 1974.

1. DeCoteau v. District County Court (No. 73-1148)

In December 1971, the State of South Dakota brought dependency and neglect proceedings in the District Court

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[1] It is common ground that, since South Dakota is not a "Public Law 280 State" by original designation or subsequent election (see Act of August 15, 1953, 67 Stat. 588: 18 U.S.C. 1162; 28 U.S.C. 1360), the State lacks civil and criminal jurisdiction over Indians within the boundaries of a subsisting reservation, regardless of whether the acts occurred on Indian trust lands or lands patented to non-Indians. See 18 U.S.C. 1151. Accordingly, the question presented might be more simply stated as: Whether the boundaries of the Lake Traverse Indian Reservation remain as originally established by the Treaty of 1867.

for the Tenth Judicial District of South Dakota against petitioner DeCoteau, an enrolled member of the Sisseton-Whapeton Sioux Tribe, seeking to terminate her parental authority over her minor children, Robert Lee Feather and Herbert John Spider, also enrolled members of the Tribe. The parties stipulated that all of the facts giving rise to the court's order occurred within the boundaries of the Lake Traverse Reservation, as established under the Treaty of February 19, 1867, *supra,* approximately half on allotted Indian land, and the other half on land patented to non-Indians (Decoteau, Pet. App. A. 2a; Pet. App. B, 9a). Both children were placed in foster homes by the county court.

On August 4, 1972, Mrs. DeCoteau moved in the county court for dismissal of the proceedings and return of her children to her on the ground that all the incidents giving rise to the proceedings involved Indians and occurred on the Reservation and that the court therefore lacked jurisdiction. The county court denied the motion.

Mrs. DeCoteau then petitioned in the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That court denied the writ (DeCoteau, Pet. App. B). While it found that Mrs. DeCoteau and the two children are enrolled members of the Sisseton-Wahpeton Sioux Tribe (DeCoteau, Pet. App. B, 8a), it ruled that the county court had jurisdiction to entertain the dependency and neglect proceedings because some of the alleged incidents occurred on non-Indian owned land within the original boundaries of the Reservation, and, in the court's view, "the non-Indian patented land * * * is not within the Indian Country" (DeCoteau, Pet. App. B, 10a).

The Supreme Court of the State of South Dakota affirmed (DeCoteau, Pet. App. A). It held that the effect of the agreement between the United States and the Tribe dated December 12, 1889, and the Act of March 3,

1891, 26 Stat. 989, 1036, ratifying that agreement, was to separate from the Reservation all lands not allotted to Indians, and, because some of the incidents occurred on such land, the State courts had jurisdiction over the family relationships at issue.

2. Erickson v. Feather, et al. (No. 73-1500)

The ten respondents in this case are all enrolled members of the Sisseton-Wahpeton Indian Tribe. They were all tried and convicted in the courts of South Dakota for alleged crimes committed within the Treaty boundaries of the Lake Traverse Reservation, but not upon trust land. At the time this suit was instituted they were incarcerated in the South Dakota State Penitentiary (Erickson, Pet. App. A, 3a). They petitioned in the United States district court in South Dakota for writs of habeas corpus on the ground that the State of South Dakota did not have jurisdiction to try, convict, and sentence them because their alleged criminal acts took place within the boundaries of the Lake Traverse Reservation (Erickson, Pet. 2). The district court, on stipulation that "the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land * * *," denied the writs (Erickson, Pet. App. B, 10a-19a).

The Court of Appeals for the Eighth Circuit reversed (Erickson, Pet. App. A, 7a-9a). After reviewing the decisions of this Court, and its prior decisions on the effect of opening reservations to non-Indian settlement, the court stated (*id.* at 6a):

> The case before us is not unlike *Seymour* [v. *Superintendent*, 368 U.S. 351] *Mattz* [v. *Arnett*, 412 U.S. 481] and *Condon* [*United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8)]. The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the

> General Allotment Act. See *Cohen, supra* at 78-80, (§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. *Seymour, supra.*

The Court found no evidence in the 1891 Act's legislative history of a congressional intent to do other than open the Reservation for non-Indian settlement (Erickson, Pet. App. A, 8a), and noted that the State Supreme Court had recently denied state jurisdiction in a similar situation in *State* v. *Molash*, 199 N.W. 2d 591. The court of appeals concluded that the boundaries of the Lake Traverse Reservation remain as established by treaty and the State of South Dakota had no jurisdiction to try the respondents (Erickson, Pet. App. A, 8a-9a).

3. The Reservation and the Tribe

The Sisseton and Wahpeton Sioux were a portion of the Sioux Nation who, in the Sioux outbreaks of 1862, did not rebel against the United States. Some "freely perilled their lives during that outbreak to rescue the residents of the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands." Others fled, "fearing the indiscriminate vengeance of the whites" (Treaty of February 19, 1867; DeCoteau, Pet. Br. App. 1).

In 1867 the United States made a treaty with the Sisseton-Wahpeton Tribes in which the Tribes "cede[d] to the United States the right to construct wagon-roads, railroads * * * and other such public improvements * * * across the lands claimed by said bands (including their

reservation as hereinafter designated) * * * " (*id.* at 2; Art. 2). In consideration for the cessions made and services rendered by the Tribes, the United States established for these Tribes "as a permanent reservation" a triangular tract of land that became known as the Lake Traverse Reservation (*id.* at 3; Art. 3).[2] The Treaty further provided (*id.* at 6; Art. 10):

> The chiefs and head-men located upon either of the reservations[3] set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided*, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

On December 12, 1889 the Sisseton-Wahpeton Sioux entered into an agreement with the United States providing that, in accordance with the Act of February 8, 1887 (the General Allotment Act, 24 Stat. 388), the Tribes do (DeCoteau, Pet. Br. App. 8):

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[2] In connection with our brief *amicus curiae* in *Antoine* v. *The State of Washington*, No. 73-717, this Term, we lodged with the Clerk copies of the U.S. Department of the Interior, Bureau of Indian Affairs Map, "Indian Lands and Related Facilities as of 1971." That map shows the Lake Traverse Reservation at issue here. We are supplying copies of the map to counsel herein. We have also appended to this brief a diagram sowing the location of trust and tribal lands within the Reservation. This diagram is taken from a more detailed but bulky map prepared by the Bureau of Indian Affairs which we are lodging with the Clerk.

[3] Article 4 of the Treaty also established the Devil's Lake Reservation in North Dakota.

> * * * hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservaiton set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

The agreement also provides that, in addition to certain settlements of past claims and indemnities, the Indians shall receive $2.50 for each acre of land conveyed, to be deposited in the Treasury and used "for the education and civilization of the said bands of Indians * * * as provided in section five [of the General Allotment Act of 1887] * * *") *id.* at 9).[4]

The ratifying Act of March 3, 1891, after reciting the Agreement in full, provides, among other things, that the land ceded by the Indians shall be—

> subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *. [*id.* at 15.]

In accordance with the Act of 1891 a large amount of land within the Reservation was patented to non-Indians. A large amount also remains Indian trust land. The State Circuit Court in *DeCoteau* found as a fact (DeCoteau, Pet. App. B, 9a, finding IX):

> That lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern

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[4] The Agreement provided that the money was to earn interest at 3% and be available for appropriation by Congress. The 1891 Act raised the interest rate to 5% and authorized the President, without further congressional action, to use any part of the funds for the "education and civilization" of the Tribe (*id.* at 14).

over the entire area within the boundaries of the Lake Traverse Indian Reservation as established by the treaty of February 19, 1867.

The Sisseton-Wahpeton Sioux Tribe has remeained a major Indian Tribe. Its present enrolled membership is 6,010, of whom 3,200 live on or near the Lake Traverse Reservation. The Tribe has a Constitution and by-laws approved by the Secretary of the Interior. In addition to having an active tribal government, it operates, with federal assistance, its own police force (presently 14 persons) and maintains a tribal court with two judges and various other personnel.[5]

It is the position of the United States, in accord with the decision of the Eighth Circuit in *Erickson*, that the Act of March 3, 1891, did not disestablish the Lake Traverse Indian Reservation and that the State of South Dakota is without jurisdiction over the domestic affairs or alleged criminal acts of Indians arising within the boundaries of the Reservation as established by the Treaty of February 19, 1867.

SUMMARY OF ARGUMENT

The essential question presented by these cases is whether the Act of March 3, 1891, by which unallotted land within the Lake Traverse Reservation was opened for settlement by nón-Indians, removed that land from the Reservation. In approaching the question it is important to bear in mind that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of the Tribe functions and the area within which federal rather than state criminal jurisdiction applies in matters affecting Indians.

The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public

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[5] Information supplied by the Sisseton-Wahpeton Agency of the Bureau of Indian Affairs.

domain, and its repeated references to the General Allotment Act show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnet*, 412 U.S. 481, show that this limited purpose is consistent only within preservation of the Reservation as a jurisdictional unit. The special provisions of the Act as to the 16th and 36th sections also show that Congress did not regard the opening of the Reservation as altering its boundaries.

Subsequent administrative and legislative actions confirm that the 1891 Act did not disestablish the boundaries of the Reservation. The President, in proclaiming the availability of lands for settlement after passage of the Act, described them as "land embraced in said reservation" and "lands within the Lake Traverse Reservation opened to settlement" (*infra*, p. 22). And the Department of the Interior has held the boundaries of the Reservation to be unaffected by the 1891 Act. Recently Congress has authorized the Secretary of the Interior to purchase lands "within the boundaries of the Lake Traverse Reservation" for the use of the Tribe and has restored to the Tribe certain federal lands within the Reservation. These acts strongly affirm the continued existence of the Reservation as a unit of federal and Indian jurisdiction.

Moreover, given the scattering of trust lands throughout the Reservation, the State's position would be destructive of law and order on the Reservation. Since the State here (being a non-Public Law 280 State) can assert no jurisdiction over Indians on trust lands, federal and trival jurisdiction over Indians everywhere within the Reservation's treaty boundaries is required for effective law enforcement.

Similarly, the Tribes' civil jurisdiction over the Reservation Indians, a basic part of tribal self-government, should not depend on the title to the lot within the Reservation where a particular act takes place. There is no

reason to believe that Congress intended so to impede the Tribe's right to govern its own people. Accordingly, the judgment of the Eighth Circuit in *Erickson* should be affirmed, and the judgment of the Supreme Court of South Dakota in *DeCoteau* should be reversed.

ARGUMENT

I

THE ACT OF MARCH 3, 1891, DID NOT ALTER THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED IN THE TREATY OF FEBRUARY 19, 1867

Article 3 of the Treaty of February 19, 1867 (DeCoteau, Pet. Br. App. 3), granted the Sisseton and Wahpeton Sioux Indians a permanent Reservation with definite boundaries. Article 10 of that treaty (*id* at 6) granted the Tribes within the Reservation the right to make their own laws and be governed by them, subject to the supervision of the United States. The basic question in this case is whether the Act of March 3, 1891, which clearly permitted non-Indian settlement within the Reservation, also altered the boundaries of the Reservation. In considering that issue we must remember that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of a tribe functions. *Worcester* v. *Georgia*, 6 Pet. 515; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164. It also describes the area within which federal criminal jurisdiction in matters affecting Indian applies, 18 U.S.C. 1151, and the area within which services of the Bureau of Indian Affairs are primarily directed, *Morton* v. *Ruiz*, 415 U.S. 199. Accordingly, the fact that portions of the land within the Reservation are owned by non-Indians is immaterial. The controlling question is whether Congress deliberately terminated or changed the boundaries of the Reservation by the Act of 1891.

1. The General Scheme of the 1891 Act Suggests No Change in the Reservation's Boundaries

The 1891 Act begins by ratifying and quoting in full the 1889 Agreement made between the Tribe and the United States. The Agreement, in its preamble, twice states that it is made under the authority of the Act of February 8, 1887, the General Allotment Act, and quotes from that Act the language which authorizes the President, after allotments have been made, to negotiate with Indian tribes for the sale of their unallotted lands (*DeCoteau*, Pet. App. C, 13a). The Agreement then specifically provides for the sale of the unallotted land of this Tribe *"within the limits of the reservation"* (*id.* at 14a; emphasis added), and directs that the payment shall be deposited in the Treasury to be appropriated by Congress for the "education and civilzation" of the Indians (*ibid.*). The Act of 1891 added to the agreement a further reference to the General Allotment Act (*id.* at 19a, sec. 29) and the proviso that the lands ceded shall:

> be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located. [*Id.* at 20a.] [6]

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[6] The background of the negotiation of the 1889 Agreement and the enactment of the 1891 Act are exhaustively set out in the brief of respondent. In our view, essentially two points are established: first, the non-Indian inhabitants of South Dakota intensely desired the opening of the Lake Traverse Reservation for settlement by non-Indians (see DeCoteau, Resp. Br., 16); second, the Tribe, which had endured four years of drought, was badly in need of money. See E. Ex. Doc. No. 66, 51st Cong., 1st Sess., p. 19. Neither of these facts, however, in any way implies that the boundaries of the Reservation had to be or were reduced. Indeed, the only money immediately paid to the Tribe was not part of the consideration for the lands "ceded" but about $500,000 conceded to be due for scout services and a cancelled annuity. For the

Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the General Allotment Act. The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, or set aside for settlement. The government is not free to use the opened land for any purpose, but only for homesteading, townsites and school land. The tribal relationship is expressly continued and monies from the sale of the land are not distributed but are kept in trust to be appropriated by Congress or applied by order of the President for the "education and civilization" of the "bands of Indians or members thereof" (*id.* at 19a). Thus, on the face of the statute, it does not appear that Congress intended to change the boundaries of the Lake Traverse Reservation.

2. The References to the General Allotment Act Show the Reservation Was Maintained

Both the 1889 Agreement and 1891 Act were adopted pursuant to the General Allotment Act of 1887. The philosophy of the latter Act was succinctly stated in *Mattz* v. *Arnett*, 412 U.S. 481, 496:

> [The General Allotment Act] permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.

It was not the purpose of the General Allotment Act to divide reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction.

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future, the Indians expected to have expended on their behalf the interest on the amount nominally deposited in the Treasury in "payment" for the land, approximately $80,000 annually (when the interest rate was raised to 5%).

Seymour v. *Superintendent*, 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra*, 412 U.S. at 497, quoting from *Seymour, supra*:

> "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Nor was it the intent of the General Allotment Act to disturb tribal relations prior to the time that the trust status of allotments should be abolished. In *United States* v. *Nice*, 241 U.S. 591, 596-597, the Court stated:

> [The General Allotment Act] disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians having allotments under the act was recognized during the trust period as still continuing.

In sum, while the General Allotment Act of 1887 provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system and to maintain established relations with the Tribes and federal trust responsibility over the reservations until these protections were no longer necessary. The 1889 Agreement and 1891 Act were adopted in conformity with this policy and should not be held to have tacitly abolished or diminished the Reservation here in question.

3. The Absence of Language in the 1891 Act Expressly Altering the Boundaries of the Reservation or Returning Land to the Public Domain Shows That the Reservation Boundaries Were Not Altered

In *Mattz* v. *Arnett, supra,* this Court stated (412 U.S. at 504-505; footnote omitted):

> Congress [in 1892] was fully aware of the means by which termination could be effected. * * * The Court stated in *United States* v. *Celestine*, 215 U.S., at 285, that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the fact of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Nice*, 241 U.S. 591 (1916).

In a footnote, the Court gave the following examples of termination language [*Mattz, supra,* 412 U.S. at 504, n. 22]:

1. 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued").
2. 27 Stat. 63 (1892) (* * * the North Half of the Coleville Indian Reservation] "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").
3. 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same hereby abolished").

There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "vacated and restored to the public domain." The reservation lines are not abolished.

Moreover, to read into the language opening unallotted lands for settlement an intent to remove them from the Reservation would inevitably create a reservation with crazy quilt boundaries, a result that both Congress (see 18 U.S.C. 1151) and this Court have reasonably sought to avoid.

4. The Use of the Word "Cede" and the Payment Arrangement of the Act Did Not Change the Reservation Boundaries

a. The State argues that the provisions "ceding" the unallotted portion of the Reservation to the United States tacitly removes that land from the Reservation.

There are several reasons why this is not so. First the "cession" is not an outright return of the land to the public domain but a transfer expressly for the limited purpose of opening the land for homesteading in accordance with the General Allotment Act. Thus, though the Indians in the "cession" expressed their willingness that the government dispose of unallotted land, the government remained under a trust responsibility to dispose of it in a certain way, assumed to be in the Indians' interest as well as that of the government.

That a "cession" of unallotted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co.* v. *United States*, 252 U.S. 159. The question was whether the defendant had grazed its sheep on public land, which was entirely legal, or on "land belonging to any Indian or Indian tribe" in violation of R.S. 2117. The lands involved were (252 U.S. at 164):

> within the part of the Reservation as to which the Indians, in terms "ceded, granted, and relinquished" to the United States all of their "right, title and interest."

Nevertheless, the Court held that the lands remained in Indian ownership until actually sold to homesteaders be-

cause the lands were ceded to the United States only for subsequent sale (except for the 16th and 36th sections) and on conditions set forth in the Act. While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word "cede" does not always imply a termination of the Indian-federal relationship as to the land "ceded".

b. The State, however, argues (see DeCoteau, Resp. Br. 59-65) that because the Tribe was paid a "sum-certain" for the unallotted land, with the government recouping its money as the lands were sold, rather than being paid as the lands were sold to homesteaders, the conveyance to the government should be held to have removed the lands from the Reservation. We see no reason so to conclude.

The payment, realistically, was no more immediately available to the Tribe than if it had been paid only as each tract was sold. The monies stipulated as payment for the lands ceded were to be deposited in the United States Treasury, and the expectation was that only the interest on this trust fund would be expended, and then only as found necessary for the benefit of the Tribe by the President or Congress. As Congressman Call explained:

> * * * The amount is reimbursed, so that it is but a nominal appropriation. The entire amount come back into the Treasury. It is nothing but a loan of the public credit of the United States to the accomplishment of these purposes [of the General Allotment Act] and in no respect touches the taxation upon the people of this country.
>
> Mr. President, there has been a great deal of objection found to this bill which has no just foundation. All the legislation to the bill is but the application of the existing law on the subject. [22 Cong. Rec. 3881, reprinted in DeCoteau, Resp. Br. 65].

Consequently, payment in this manner is not a reliable indication of an intent by Congress to change the boundaries of a reservation. Where the references to allotment and opening under the General Allotment Act are as specific as they are here and where, as here, there is no language even arguably disestablishing a discrete part of the Reservation, the payment scheme does not indicate disestablishment anymore than would a scheme of payment as individual lots are sold to homesteaders. In either situation, the conveyance of the unallotted lands is handled by the government for the benefit of the Tribe in accordance with the General Allotment Act without thereby terminating the Reservation. Compare *Seymour* v. *Superintendent, supra*, 368 U.S. at 354-359.

5. The Provision of the 1891 Act Referring to the "Laws of the State Wherein Located" Did Not Disestablish All or Part of the Reservation

The Act of 1891 provides that the land ceded shall "be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *" (Decoteau, Pet. Br. App. 15). The Supreme Court of South Dakota, in *DeCoteau*, interpreted the final phase of this passage as expressly subjecting activities on all lands sold to state civil and criminal jurisdiction (DeCoteau, Pet. App. A, 5a-7a). The Eighth Circuit in *Erickson* found the language ambiguous—both as to its general meaning and as to whether it applied only to the school sections (which the court considered more plausible) or to all land sold. It concluded that "[W]e do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse Reservation" (Erickson, Pet. App. A, 6a-7a). In our view, the "laws of the state" language is simply not addressed to the question of whose law shall govern acts committed on the land in question; the purpose is, rather, to make clear that, while the un-

allotted land shall be open only to settlement under the federal homestead and townsite laws, an exception is made for the 16th and 36th sections which are to be used only for common school purposes and may be used or sold as permitted by state law for that purpose.

The language was necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes, and special language was needed to accomplish that purpose. See the Statement of Senator Gamble at 35 Cong. Rec. 3187 and the Statement of Congressman Burke at 38 Cong. Rec. 1423, both reproduced at DeCoteau, Resp. Br. 136-138. Indeed, if the "ceded" land had been regarded by Congress as no longer forming part of the Reservation, no such special language would have been needed to establish the 16th and 36th sections as school land.[7]

In sum, while the Act of March 3, 1891 paved the way for homesteading by non-Indians within the Lake Traverse Reservation, it did not change the boundaries of the Reservation or abolish it. Thus questions of criminal and civil jurisdiction within this Reservation are determined as within any other Reservation.

II

SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES

a. The most important administrative interpretation of the 1891 Act is the contemporaneous proclamation of President Harrison opening the Reservation for settlement

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[7] See Section 1 of the Act of March 2, 1895, 28 Stat. 899-900, 43 U.S.C. 856, which, 4 years later, provided general authorization for state selection of school lands "within the boundaries of any Indian reservation in such state" from "surplus lands * * * purchased by the United States."

(Procl. of April 11, 1892, 27 Stat. 1017, DeCoteau, Pet. Br. App. 16-20). In that Proclamation, made after enactment of the 1891 Act and after payment to the Tribes for the land "ceded," the President consistently referred to the Reservation in the present tense and the lands opened for settlement as "lands embraced in said reservation" (DeCoteau, Pet. Br. App. 18). The Proclamation further referred the reader to "the accompanying schedule, entitled "Schedule of lands *within the Lake Traverse Reservation opened to settlement* by proclamation of the President * * * " (*id.* at 19; emphasis added). This proclamation is important not only because it is a contemporaneous construction of the effect of the 1891 Act, but also because it was the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian reservation.

Subsequent executive orders extending the trust period on allotments on April 16, 1914, and April 19, 1924, (Nos. 1916 and 3994, respectively) each refer to the 'Sisseton and Wahpeton Bands of Sioux Indians of the Lake Traverse Reservation, North and South Dakota." And in decisions and literature of the Department of the Interior after 1891 there are numerous references to land "in" or "within" the Lake Traverse Reservation. *Circular, Sisseton and Wahpeton Lands,* 14 L.D. 302; *Madella O. Wilson,* 17 L.D. 153; *Edward Parant,* 20 L.D. 53. Nothing could be clearer than the report of the Sisseton-Wahpeton Indian Agent in 1900 describing the Reservation:

> The reservation is in the northeastern part of South Dakota, occupying parts of Roberts, Day, Grant, Marshall and Codington counties and extending into Richland and Sargent counties of North Dakota. It is about 120 miles long and at the State line 42 miles wide, coming to a point near Watertown, S. Dak. * * *

> There are 1,970 [allotted] pieces of land situated from one end of the reservation to the other * * *.
>
> [Annual Report Commissioner of Indian Affairs, United States Indian Affairs Office, 385 (1900)].

See also the reference to the Annual Reports of the Commissioner of Indian Affairs in DeCoteau, Pet. Br. 42, n. 30.

Of equal importance, the exercise of trust responsibility by the United States for this Tribe, and the Tribal relationship of its members, remained intact. A decision of the Eighth Circuit in 1901, ten years after allotment and disposal of surplus land, makes this continuing relationship clear. *Farrell* v. *United States,* 110 Fed. 942. The case concerned the application of the laws against sale of liquor to Indians to a sale to one La Framboise, a person of mixed Sioux and Caucasian ancestry. While the boundaries of the Reservation were not at issue, La Framboise's membership in the Sisseton-Wahpeton Tribe was. The court noted that:

> La Framboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that had not been allotted, had been opened to settlement * * *. [*Id.* at 947.]

Nevertheless, it was found that there was continuing regulation by the Tribe of its membership and family relations and constant supervision over the Tribe by the resident federal agent:

> [The issuing of allotments] did not radically change the title to the lands reserved for [these Indians], or their need of care and education. The government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why congress should retain and exercise its power to superintend

> the trade with them, and none to induce it to renounce it. By the treaty of 1867 the United States agreed to appoint and maintain an agent for these Indians at Lake Traverse, and by its legislation and the rules of the interior department it made it the duty of this agent to use every endeavor to suppress the traffic in intoxicating liquors with them, to educate them, and to induce them to cultivate the soil. There has been no express abrogation of this agreement in any subsequent treaty or act of congress, and the government has continued to comply with it since the allotments as it did before. Agreements are not released or abrogated and statutes are not repealed by implication unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. [*Id.* at 951.]

This evidence of the continued exercise of federal trust responsibility after the opening of the Reservation supports our conclusion that the Reservation was opened, but not dissolved. See also *United States* v. *Rickert*, 188 U.S. 432.

We have been unable to discover contemporaneous opinions of the Department of the Interior directed precisely to the jurisdictional effect of the 1891 Act. There are, however, two recent decisions, predating either of the appellate decisions under review, and rendered at a time when *DeMarrias* v. *State*, 319 F. 2d 845 (C.A. 8), overruled by the *Erickson* decision, was still intact. Both decisions, made by the Field Solicitor of the Department of the Interior in Aberdeen, South Dakota (the office which deals with this Tribe on a regular basis), sustained the continued federal and tribal authority and the commenusurate lack of state jurisdiction over Indians within the Treaty boundaries of the Lake Traverse Reservation (Opinions of June 9, 1972 and August 16, 1972, DeCoteau, Pet. Br. App. 21-33). Interpretation of a law by the government agency responsible to administer it is,

of course, entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16. This is particularly true when the statute may affect the status of an Indian reservation and the trust responsibilities of the United States. *Seymour* v. *Superintendent, supra*, 368 U.S. at 357; *Mattz* v. *Arnett, supra*, 412 U.S. at 505.[8]

b. Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton

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[8] South Dakota points out (DeCoteau, Rep. Br. 113-116) that the depiction of the Reservation on government maps varied considerably over the years since 1891. From 1892 to 1908 the Reservation was not shown on the maps. From 1909 to 1917 the Reservation was shown as an "open" reservation, but the 1918 map shows it was a "former" reservation. Modern maps show the Reservation simply as a "reservation." We think these differences are unimportant. The early map-makers wanted to show that the lands were no longer reserved for exclusive Indian occupancy, but were open for settlement. As this Court and Congress began to refine the jurisdictional meaning of such openings the map makers followed suit. Indeed the meaning of the word "reservation" itself has changed over the years. In early years it seemed to have been used to mean literally land reserved for exclusive Indian use. Later, as a result of the various "opening" Acts, it came to have the broader jurisdictional meaning that it has today. The first decision of this Court to clarify the meanings of "reservation" and "Indian country" after the General Allotment Act was *United States* v. *Celestine*, 215 U.S. 278, 285-286. This process of clarification continued with enactment of 18 U.S.C. 1151 and this Court's subsequent decision in *Seymour* v. *Superintendent, supra*. Thus, as with early maps, early casual references to the Reservation as the "former reservation" (see DeCoteau, Br. 9) are of little significance; they indicate only that the Reservation had been opened for non-Indian settlement, which is not disputed. South Dakota also points out a reference to the "former Sisseton Indian Reservation" in *United States* v. *Rickert, supra*, 188 U.S. at 432 (see DeCoteau, Resp. Br. 173). That phrase, however, is not the Court's but part of a question from the pleadings below as recited in the question certified to the Court. Reservation bundaries were not at issue and the use of the phrase must be considered in light of its limited meaning at the time.

Reservation or Agency[9] and has never referred to the Reservation as a "former reservation" as it did with the reservations recognized by this Court as continuing to exist in *Seymour* v. *Superintendent, supra,* 368 U.S. at 356, n. 12, and *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 17. This consistent appropriation process is a significant exercise of trust responsibility. Recently, moreover, Congress has unmistakenly reaffirmed its view that the opening of the surplus lands to non-Indian settlement did not terminate or diminish the Reservation (Public Law 93-489 and Public Law 93-491, signed by the President October 26, 1974). Indeed, in Public Law 93-489 Congress restored to "the United States in trust for the Sisseton-Wahpeton Sioux Tribe" certain federally owned land "of the Lake Traverse Indian Reservation in North and South Dakota." Since the land had not been trust land, this is a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land. Similarly, Public Law 93-491 authorizes the Secretary of the Interior to acquire lands:

> *within the boundaries of the Lake Traverse Reservation* * * * for the purpose of consolidating landholdings, eliminating fractional heirship interests in Indian trust lands, providing land for any tribal program for the improvement of the economy of the tribe and its members through the development of industry, recreational facilities, housing projects, and the general rehabilitation and enhancement of the total resource potential *of the reservation.* [Emphasis added.]

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[9] See, for typical early appropriation language, 39 Stat. 988 and 42 Stat. 576. In recent years general appropriations have not been by particular reservation or agency. An extensive accounting of trust funds of the Tribe expended by the United States is available in General Services Administration Report, *The Lower Sioux Indian Community in Minnesota, et al.*, Docket No. 363 (June 1967) before the Indian Claims Commission.

It further authorizes the Tribe to sell tribal property and, from the proceeds, purchase *"other land on the reservation."* Again, we have a recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. While these recent Acts are not determinative of an earlier congressional intent, they are consistent only with the continuity of the Reservation's original boundaries and should be given weight. See *Seymour* v. *Superintendent, supra,* 368 U.S. at 356.

III

THE TRIBE'S INHERENT RIGHT OF SELF-GOVERMENT, CONFIRMED IN THE TREATY OF FEBRUARY 19, 1867, AND THE PRACTICALITIES OF PERFORMING THE CONTINUING TRUST RESPONSIBILITIES OF THE UNITED STATES TOWARD THE TRIBE SUPPORT THE INTERPRETATION OF THE ACT OF 1891 AS NOT DIMINISHING THE RESERVATION

We have discussed the jurisdiction of the State within the borders of the Lake Traverse Reservation primarily in terms of the precise wording of the statute opening the Reservation for non-Indian settlement. But the alleged ambiguity of the Act of 1891 and of similar Acts opening reservations also calls for a broader approach.

We note, first, that the Sisseton-Wahpeton Tribe remains an important and populous Indian tribe exercising its federally guaranteed powers of self-government under federal guardianship. A large amount of land, scattered about within the boundaries of the Reservation, remains trust land. The State of South Dakota did not choose to assume responsibility for civil and criminal law and law enforcement within Indian country in the state when it could have done so under Public Law 280, *supra.* Compare *Williams* v. *Lee,* 358 U.S. 217, 222-223; *Mc-*

Clanahan v. *Arizona State Tax Commission*, 411 U.S. 164, 177-178. Nor is the decision that the State asks of this Court one that could give the State jurisdiction over acts occurring on trust land. Instead, the result sought by the state would greatly increase the difficulty of achieving adequate law and order on the reservation by requiring plat-book jurisdiction—state jurisdiction over Indians on this lot, federal or tribal jurisdiction on the next. Obviously, such an absurd result, in a reservation such as this, where a large Indian population lives, ought to be avoided, if possible.

Also, and equally important, it is, and has been, the policy of the United States that, unless specifically terminated by Congress, Indian tribes are self-governing political communities. In *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 168, this Court stated:

> * * * "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive * * *."

See also *Williams* v. *Lee, supra,* 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right or reservation Indians to make their own laws and be ruled by them.

This right to self-government was explicitly guaranteed the Sisseton-Wahpeton Tribe in its 1867 Treaty with the United States and has never been taken away by Congress. Article 10 of that Treaty states (DeCouteau, Pet. Br. App. 6):

> The chiefs and head-men located upon either of the reservations set apart for said brands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians * * *.

Tribal control over domestic relations, at issue in *DeCoteau*, is at the heart of this right of Tribal self-government. See, *e.g.*, *United States* v. *Quiver*, 241 U.S. 602, 603-604. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. No matter how well-intentioned, state authorities are not likely to have insight into these important areas. Moreover, if such authorities are to have jurisdiction over tribal children in dependency and neglect cases, there is a substantial chance that such children may be placed in non-Indian homes outside the Reservation and be deprived of their cultural identity.[10] The Sisseton-Wahpeton Tribe opposed such practices in a tribal resolution on July 6, 1972, which states:

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[10] This concern, in the light of present experience, was strongly expressed by the North American Indian Women's Association in a recent report. North American Indian Women's Association, Inc., *Project Report for Development of a Prototype Program for Indian Children with Special Needs*, BIA Contract No. K51C14200761, December 15, 1973. The first recommendation made by the study was that "[W]hen at all possible, Indian Children should be placed with Indian foster parents." *Id.* at 62.

SISSETON-WAHPETON SIOUX

WHEREAS, The Sisseton-Wahpeton Sioux Tribe is interested in the well-being of all the enrolled members of the tribe and

WHEREAS, Minor children of Sisseton-Wahpeton descent have been placed in non-Indian foster and adoptive homes all over the United States,

WHEREAS, The Tribal council is in the process of researching the sovereign status of the tribal entity in respect to its jurisdiction as stated in the constitution of the Sisseton-Wahpeton Sioux Tribe, and,

WHEREAS, It is the intent of the Sisseton-Wahpeton Sioux Tribe to establish its own method of social and economic development and well-being of the enrolled members, and,

WHEREAS, It is the strong feeling of the tribal council "to make every stand possible to keep these children on the reservation" (minutes of June 6th council meeting) and "the tribal council would like these children to be placed in an Indian licensed home until an Indian home can be found for them to be adopted."

THEREFORE, BE IT RESOLVED, that Mr. Bert Hirsch, legal counsel from the Association of American Indian Affairs, will stand on these grounds in his argument in Robert County Court on July 7, 1972 and future cases of this nature.

The Sisseton-Wahpeton Tribe is a responsible body, concerned about its young people. It should have authority over dependency and neglect and similar proceedings concerning its own people anywhere within the Reservation.[11] If this authority were fragmented so as to apply only to acts committed on trust land within the

[11] The Tribe has assumed such authority under its tribal code.

Reservation, it would be practically meaningless as an exercise of effective self-government. And neither the Tribe, in domestic relations matters and with respect to the criminal offenses left to its control, nor the United States, in its control over major crime, should have to search the tract books in order to determine whether it or the State has jurisdiction. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of South Dakota should be reversed and the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

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NOVEMBER 1974.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE, PETITIONER

v.

HONORABLE RICHARD KNEIP, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 521 F.2d 87. The opinion of the district court (Pet. App. 63-113) is reported at 375 F.Supp. 1065.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975 (Pet. App. 61). A petition for a writ of certiorari was filed on October 11, 1975, and was granted on May 24, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether three Acts of Congress, which authorized the sale of land within portions of the Rosebud Indian Reservation to non-Indians and directed that the proceeds of each sale as received should be deposited in trust for the benefit of the Tribe, diminished the exterior boundaries of the Reservation as they existed in 1889.

STATUTES INVOLVED

The Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, are set forth in Appendix C to the petition.

STATEMENT

In June 1972, the Rosebud Sioux Tribe of Indians filed suit in the United States District Court for the District of South Dakota, seeking a declaratory judgment that the exterior boundaries of the Rosebud Reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been altered by three Acts of Congress (Act of April 23, 1904, 33 Stat. 254; Act of March 8, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448) opening certain unallotted surplus land to non-Indian settlement.

In the Act of March 2, 1889, Congress "restored to the public domain"[2] (25 Stat. 896) one-half of the Great Sioux Reservation established in 1868, but preserved for the Sioux Tribes six Reservations in present-day North and South Dakota (*id.* at 888-890). Among these was the Rosebud Reservation, located in the south central portion of South Dakota, and composed of the Counties of Todd, Tripp and Mellette, and parts of Gregory and Lyman counties.[1]

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[1] A map of the Reservation, showing the 1889 boundaries and the boundaries as found by the court of appeals, is reproduced at Pet. App. 113.

In 1901, the Rosebud Tribe agreed (Pet. App. 15, n. 21) to "cede * * * and convey to the United States" for a specified sum of $1,040,000 the unallotted land within the Gregory County portion of its Reservation for non-Indian settlement. Congress rejected this agreement in 1902 and 1903. The problem "was, simply put, money" (Pet. App. 16). Congress then "amended and modified" the agreement (Pet. App. 117) and enacted it as the Act of April 23, 1904 (Pet. App. 117-120). The primary amendments were that (1) the Indians were not guaranteed any consideration for the land except with respect to the 16th and 36th sections (school section), but were to be paid only as the lands were actually sold to settlers;[2] (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. 118, with Art. III, Pet. App. 115-116).

The Rosebud Reservation was further opened by the 1907 Act, which, as passed, provided (Pet. App. 121) "that the Secretary of the Interior * * * is hereby, authorized and directed, * * * to sell or dispose of all that portion of the Rosebud Indian Reservation * * * [within Tripp County] except such portions thereof as have been, or may hereafter be, allotted to Indians" (and except school sections that were to be paid for by the United States, and granted to the State).[3] The 1907 Act further provided (Section 5, Pet. App. 122-123) that the funds

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[2] Section 2 of the Act (Pet. App. 119) set forth a schedule of the prices per acre for the land, which varied according to the time at which the land was sold.

[3] Each Act contains substantially identical school land provisions to the effect that Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for donation to the State for use as common schools. These lands were to be paid for by the federal government. See Pet. App. 120, 121, 123, 127.

received should be deposited in an interest-bearing account in the Treasury of the United States "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation," that the interest shall be paid annually to the Indians, that all funds up to one million dollars should be distributed after ten years on a per capita basis to the Indians, and that the balance should be expended or distributed for the Indians' benefit at the discretion of the Secretary of the Interior. The 1907 Act concluded, as did the 1904 Act (Section 6, Pet. App. 120), with a section declaring (Section 8, Pet. App. 123):

> * * * nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the *United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided* * * *. [Emphasis added.]

The 1910 Act (Pet. App. 124-127), like the 1907 Act (Pet. App. 121), began with an authorization to the Secretary to "sell and dispose" of surplus lands within a described portion (Mellette County) of the Reservation App. 124).[4] The Act further provided (*ibid.*)

> [t]hat any Indians to whom allotments have been made on the tract to be *ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof

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[4] The 1907 Act uses the phrases "sell *or* dispose" (emphasis added).

> on the diminished reservation * * *. [Emphasis added.]

The 1910 Act further required (Section 4, Pet. App. 125) that a commission be established, composed of "[o]ne resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians," to determine the price setters would be charged for the land. The proceeds of any eventual sales were to be deposited in the Treasury to the credit of the "Indians belonging and having tribal rights on the said reservation," which "shall be at all times subject to appropriation by Congress for their education, support and civilization" (Section 7, Pet. App. 126). The 1910 Act (Section 11, Pet. App. 127), like the earlier Acts (Section 6, Pet. App. 120; Section 8, *id.* at 123), explictly stated that the United States was not obligated to purchase the surplus land, except Sections 16 and 36 for school purposes, and would act only as trustee for the Indians in disposing of the surplus land.

In a lengthy opinion the district court held that each of the 1904, 1907 and 1910 Acts extinguished the portion of the Reservation to which it applied (Pet. App. 63-113; see *id.* at 113). The court found no language in the Acts expressly terminating the Reservation in the counties involved and no "express discussion of state versus federal jurisdiction over the lands in question" (*id.* at 85); however, the court held that, in light of the "surrounding legislative history and the circumstances" (*id.* at 109) from 1901 to 1910, Congress intended to extinguish the portions of the Reservation at issue.

The United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 1-61), after this Court had decided *DeCoteau* v. *District County Court*, 420 U.S. 425. The court rejected arguments of the Tribe, and the United States as *amicus curiae*, that the language of the Acts interpreted in light of prior decisions of this Court

did not abolish the disputed portions of the Reservation, and that neither the legislative nor the administrative history established that the State had undisputed jurisdiction to the exclusion of the Tribe and the United States. The court thought that prior decisions, including this Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, and its own decisions in *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121, and *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, were "of limited utility" in deciding this case (Pet. App. 5) and concluded that "the overriding judicial inquiry remains unchanged, namely, the congressional intent" (*ibid.*). Stating that this Court's decision in *DeCoteau, supra*, permitted it to utilize "all materials reasonably pertinent to the legislation * * * as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area * * *" (Pet. App. 8), the court found a "continuity" of circumstances from 1901 to 1910 that demonstrated Congress' intention to extinguish Indian jurisdiction over the areas in question (*id.* at 26-28, 34, 38, 39-40, 44, 46, 48).

SUMMARY OF ARGUMENT

It is the position of the United States that the Acts of 1904, 1907, and 1910, while opening portions of the Rosebud Reservation to non-Indian settlers, did not contract the exterior boundaries of the Reservation. This position is based upon our assessment of the Acts themselves, the contemporary social and legislative history, subsequent treatment of the lands by the Department of the Interior, and doctrines developed by this Court in similar cases. While the courts below gave some attention to each of these factors, we believe that the courts overemphasized inconclusive legislative history. A more balanced analysis, we submit, requires a finding that Congress did not intend by these Acts to terminate most of the Reservation but expected that termination would occur, if at all, when the trust period on allotments expired.

This Court's decisions require compelling evidence to prove that reservation boundaries have been cut back without the consent of the affected Indian tribe and without guaranteed payment for the opened lands. Any different construction would place Indians in the position of surrendering jurisdiction over substantial portions of their reservation before any benefits had been assured or received. Thus, the Court found in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, that unilateral Acts of Congress, providing that the United States would not purchase Indian lands but would merely act as trustee for their sale, did not commit the opened lands to state jurisdiction. The Acts opening the Rosebud Reservation were drafted in similar fashion and are to the same effect.

The Acts of 1904, 1907, and 1910, do not demonstrate an intention to return lands to the public domain, and the clear language of other Acts expressly restoring lands to the public domain is notably absent. In contrast to public lands, which are subject to disposition under general laws, the lands of the Rosebud Reservation were to be sold only in accordance with the terms of the trust established by Congress; all proceeeds were explictly dedicated to the benefit of the Tribe. In fact, Congress included a provision granting school lands to the State in each Act, despite this Court's holding in 1902 that such provisions were unnecessary when lands were restored to the public domain. *Minnesota* v. *Hitchcock*, 185 U.S. 373.

Subsequent administrative actions confirm that the Acts did not disestablish the 1889 boundaries of the Reservation. Under the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. 461, *et seq.*, the Department of the Interior restored to Indian ownership lands in the opened portion of the Reservation, an action that could not have included lands "upon the public domain outside the geographic boundaries of any Indian

reservation * * *" (48 Stat. 986). Moreover, numerous communications and reports show that the Deparement, before and after the Indian Reorganization Act, recognized territory in the opened counties as within the Rosebud Reservation. Recent appropriations are consistent with that viewpoint.

The uncertain legislative history does not demonstrate a contrary intention. Despite the emphasis placed on the legislative history by the court of appeals, the reports and debates show that Congress at no time concerned itself with the question of jurisdiction over the opened lands. While the court of appeals stressed references made in unrelated contexts, we submit that the inferences to be drawn from such references are at best ambiguous. They do not merit the weight that they received in the court of appeals.

The Acts of 1904, 1907, and 1910, therefore, do not demonstrate congressional intent to impede the Tribe's right to govern its own people.

ARGUMENT

I. THE DECISIONS OF THIS COURT HOLD THAT ACTS OF CONGRESS ESTABLISHING TRUSTS FOR THE SALE OF INDIAN LANDS DO NOT REDUCE RESERVATION BOUNDARIES

This Court, in deciding Indian cases, does not write upon a fresh slate. The Court has long recognized that "[t]he relation of the Indian tribes living within the borders of the United States * * * [is] an anomalous one and of a complex character." *United States* v. *Kagama*, 18 U.S. 375, 381. "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States." *Id.* at 383-384 (emphasis in original). With respect to legislation, therefore, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless

people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367.

During the past fifteen years this Court has been asked three times to decide whether Congress intended to cut back reservation boundaries or to open up reservation lands for settlement with the existing boundaries unchanged. *Seymour* v. *Superintendent*, 368 U.S. 351; *Mattz* v. *Arnett*, 412 U.S. 481; *DeCoteau* v. *District County Court*, 420 U.S. 425. The principles developed by those decisions are directly applicable to the questions raised in this case.

In *Seymour*, this Court considered the effect of the Act of March 22, 1906, 34 Stat. 80, on the Colville Indian Reservation in the State of Washington. In 1892, the United States expressly vacated and restored a portion of the Reservation "to the public domain," 27 Stat. 62, 63. In the 1906, Act, however, no such language was included; the Secretary was merely directed "to sell or dispose" of unallotted lands within the Reservation (34 Stat. 80) and to place the proceeds as received from settlers into the Treasury for the benefit of the Indians (34 Stat. 81). The Act further provided that the United States would act as a trustee in disposing of these lands for the Indians' benefit and not as a purchaser (34 Stat. 82). Because *Seymour* involved a criminal matter, this Court assessed the meaning of the 1906 Act against the backdrop of the definition of "Indian Country" found in 18 U.S.C. 1151.[5]

This Court concluded that "the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsi-

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[5] Indian country is defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation * * *."

bility for and jurisdiction over the Indians having tribal rights on that reservation." 368 U.S. at 356. The Colville Act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards" (*ibid.*). The Court noted that any other conclusion would result in checkerboard jurisdiction over Indians, a consequence that Congress sought to avoid by enacting 18 U.S.C. 1151 (*id.* at 358).[6]

In *Mattz* this Court was required to decide whether the Klamath River Indian Reservation in California was terminated by an 1892 Act of Congress or remained Indian country as defined in 18 U.S.C. 1151 (412 U.S. at 483). After assessing legislative history and subsequent administration of the land by the Interior Department, the Court concluded, as it had in *Seymour*, that the mere opening of the Reservation to settlers did not mean that the Reservation was discontinued. Recognizing that "the House was generally hostile to continued reservation status of the land," the Court nonetheless found that Congress never terminated it (*id.* at 499)[7] but merely provided for

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[6] This Court took particular note of the subsequent treatment of this area by Congress and by the Interior Department and gave particular attention to the Department's decision, 54 I.D. 559, that land within the Colville Reservation previously opened to settlement could be restored to Reservation status under the Indian Reorganization Act of 1934 (368 U.S. at 357, n. 14). This Court recognized a period of "congressional confusion" when the area was referred to as the "former Colville Reservation" (*id.* at 356, n. 12), but did not find such references indicative of a Congressional intent to terminate jurisdiction over the Reservation.

[7] The State urged that a reference in the 1892 Act to "what was [the] Klamath River Reservation," indicated a Congressional intention to terminate. This Court found the reference to the Reservation "in the past tense * * * merely * * * a natural, convenient and shorthand way of identifying the land subject to allotment * * *" (*id.* at 498). Cf. *Seymour*, *supra*, 368 U.S. at 356, n. 12.

sale of the surplus lands with the "proceeds of sales to be held in trust for the 'maintenance and education' * * * of the Indians" (*id.* at 504). Because a decision to terminate a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history" (*id.* at 505), this arrangement did not deprive the Indians of their important reservation rights.[8]

Placing the 1892 Act into the historic context of the General Allotment Act of 1887, 24 Stat. 388, the Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. *When all the lands had been allotted and the trust expired, the reservation could be abolished*" (412 U.S. at 496; emphasis added). See also *United States* v. *Nice*, 241 U.S. 591, 599. However, enactment of the Indian Reorganization Act in 1934, 48 Stat. 984, as amended, 25 U.S.C. 461 *et seq.*, ended the policy of allotment, and all trust periods were indefinitely extended (412 U.S. at 496, n. 18). Later, as the Court noted, portions of the land in the Klamath Reservation previously opened to settle-

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[8] After this Court's decision in *Seymour*, the Eighth Circuit considered whether the Act of May 29, 1908, 35 Stat. 460, opening the Cheyenne River Reservation in South Dakota, diminished its boundaries. Relying on *Seymour*, it held it did not, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8), and this Court in *Mattz* twice noted that decision with approval, remarking that it presented "issues not unlike those before us" (412 U.S. at 497, n. 19 and 505, n. 23). The Eighth Circuit had reached a similar conclusion in *City of New Town, North Dakota* v. *United States*, 454 F.2d 121, involving the effect of the Act of June 1, 1910, 36 Stat. 455, opening the Fort Berthold Reservation.

ment were withdrawn and restored to tribal ownership (*id.* at 496, n. 17 and 505).[9]

In *DeCoteau,* the Court determined the effect of the Act of March 3, 1891, 26 Stat. 989, 1035, on the Lake Traverse Reservation. The 1891 Act had ratified an agreement in which the Tribe expressly ceded to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz* (420 U.S. at 447-449, stating that it "adhere[d] without qualification to both the holdings and the reasoning of those decisions"; the Court, however, found that "gross differences between the facts * * *" (*id.* at 447) justified a finding that the Reservation had been terminated.

The differences identified by the Court are important to the present case. The 1891 Act was a negotiated agreement with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to be the Tribes (*id.* at 448). The 1891 Act was a straightforward cession for a sum certain in amount, and not the arrangement found in *Mattz* and *Seymour* where proceeds from uncertain future sales were placed in trust for the benefit of the Tribe (*id.* at 448-449). The Department of the Interior did not, as it had in *Mattz* and *Seymour,* consistently regard the Reservation as continuing (*id.* at 448). These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain.

The fact that the Indians' land holdings would be diminished as the land was sold, therefore, does not mean that the Rosebud Reservation itself was abolished in the areas where the land subject to sale was located. In *DeCoteau* (but not in *Seymour* or *Mattz*) the United States

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[9] The Klamath River Reservation was also identified by the Interior Department (54 I.D. 559), as containing land, opened by the 1892 Act, which could be restored to reservation status.

itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation. 420 U.S. at 446-447. But under the Rosebud Acts, the federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was not first made part of the public domain, and Congress appropriated no funds to pay for these lands, except for school sections. Rather, any funds distributed to or deposited on behalf of the Indians were to be derived from amounts paid by the non-Indian purchasers. If there were no buyers interested in the land the government was to sell for the Indians, the Indians would have received no money; yet according to the reasoning of the court below, the Tribe nevertheless would have been deprived of three-fourths of its Reservation. Such an intention should not be attributed to Congress without the clearest kind of evidence.

Every court faced with similar questions, except the courts below, has found that such Acts of Congress did not extinguish portions of the Reservations but instead opened the Reservations to allow integration of Indians and settlers and to provide needed lands for the western migration.[10] This construction is consistent not only with proper concern for Indian sovereignty but also with the long-standing reluctance to place Indian wards within the reach of state jurisdiction. "The policy of leaving Indians free from state jurisdiction and control is deeply

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[10] *Russ* v. *Wilkens*, 410 F. Supp. 579 (N.D. Cal.); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.); *City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8); *Putnam* v. *United States*, 248 F.2d 292 (C.A. 8); *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont.), affirmed, 534 F.2d 1376 (C.A. 9), pending on petition for certiorari, No. 76-185.

rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.

Although the court of appeals found these principles "of limited utility" (Pet. App. 5), we believe they may not be so lightly dismissed.[11] While we do not read the cases to say that Congress could never remove lands from a reservation by a unilateral decision to act as trustee for their sale, that construction should be greatly disfavored. This is particularly true when, as here, Congress demonstrated quite clearly that it did not intend to place the Indian lands within the public domain.

II. THE ACTS OF 1904, 1907 AND 1910 DID NOT RESTORE INDIAN LANDS TO THE PUBLIC DOMAIN

The United States does not dispute that Congress during the early 1900's expected that Indian reservations at some point would be abolished. Congress was faced with pressures to open additional land located within existing Indian reservations and Congress itself desired that Indians gradually develop a less tribal way of life. The integration of Indians while white settlers was viewed as an important step in that development. The question in this case, therefore, is not whether Congress intended the Rosebud Reservation to continue unchanged indefinitely but whether termination was to occur immediately upon passage of the Acts or at some later time, when the trust period on allotted Indian lands had expired.

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[11] The court of appeals apparently misunderstood (Pet. App. 24-25) the significance of the fact that Congress did not secure the approval of the Rosebud Indians as required by the Treaty of 1868 (15 Stat. 635, 639). While Congress had the power to dispose of lands without such consent, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, its decision to do so must be regarded as unilateral. In fact, the government's negotiator, Inspector James McGlaughlin, repeatedly stressed to the Indian that their lands could be sold without their consent and that they should redirect their efforts to securing a reasonable price. *E.g.*, A. 476, 481, 490, 776, 803-804.

1. The language of the Acts themselves does not disclose an intent to return land to the public domain. The 1904 Act provides for the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted [within Gregory County]" (Pet. App. 115), but that terminology was simply carried over from the unratified agreement for sale at a sum certain. The 1904 Act nowhere provides that the Reservation was abolished or that the lands were to be restored to the public domain. The Acts of 1907 and 1910 provide that the Secretary of the Interior shall "sell or dispose" (in the 1907 Act) or "sell and dispose" (in the 1910 Act) "of all that portion of the Rosebud Indian Reservation subsequently described (Pet. App. 121, 124). Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands. This reticence is in marked contrast to the express language used by Congress in other statutes. See 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain"); 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished"). See also *Mattz* v. *Arnett*, *supra*, 412 U.S. at 504, n. 22.[12]

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[12] The language of the 1904 Act is similar to the statutory language discussed in *DeCoteau*, *supra*, and found sufficient to terminate the Reservation. But Congress had *ratified* a sale for a sum-certain in that case, and the words of cession in that context merely reflected the common understanding of the Indians and the government. The words in this case were originally part of a similar agreement, which Congress refused to ratify. Although Congress retained the form of the agreement in passing the 1904 Act, the language disappeared in the Act of 1907 and 1910, both of which were passed without tribal consent.

The mere fact that the government had power to sell the Indians' lands does not mean that they are public lands. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger*, 92 U.S. 761, 763. The United States commonly owns public lands free of beneficial rights and may dispose of them for its own benefit. Its power over the Rosebud Reservation lands, however, was significantly different; under the Acts of 1904, 1907, and 1910, the United States could sell the lands only under specified conditions and was required to administer the proceeds for the benefit of the Rosebud Indians. Unlike agreements providing for sale for a sum-certain, the three Acts in question specifically stated that the United States did not guarantee to buy, or even to find purchasers for, the affected lands. In fact, part of the lands was later released from the trust in accordance with the Indian Reorganization Act of 1934 (pp. 28-33, *infra;* App. A, *infra*, p. 1A).

The provision for schol lands in each of the three Acts indicates that Congress was aware of the nature of this trust. In May 1902, this Court, in *Minnesota* v. *Hitchcock*, 185 U.S. 373, had considered the troublesome question whether a cession-in-trust to the government for resale gave Minnesota the right to Sections 16 and 36 of the ceded lands for school purposes.[13] (The Enabling Act admitting Minnesota to the Union, like the Enabling Act of South Dakota, provided that the State was en-

[13] Congress was well aware of the importance of *Minnesota* v. *Hitchcock*. After the Department of the Interior moved to dismiss the State's original action in this Court, on the ground that the Chippewa Indians were indispensable parties, Congress passed an Act expressly permitting the Interior Department to appear instead of the tribe in such cases. Act of March 2, 1901, 31 Stat. 950. The Committee Report on the bill (H.R. 14191) stated that "it is of the utmost consequence * * * that there be the most speedy determination of a vexed question that has dragged through forty years" (H.R. Rep. No. 2948, 56th Cong., 2d Sess. 1 (1901)).

titled to Sections 16 and 36 from all "public lands" within the State for schools.) This Court concluded that, while Minnesota would be entitled to Sections 16 and 36 of public lands even though no express exception in the instrument of conveyance was made (185 U.S. at 392-393), the land in question had never been restored to the public domain because the cession was in trust and the proceeds from uncertain future sales were to be deposited in the Treasury for the Indians' benefit (185 U.S. at 395). Thus Congress, if it wanted the State to receive Sections 16 and 36 while they remained within the opened Indian reservation, had to include an express provision to that effect. Such provisions were contained in all three Rosebud Acts.[14]

The legislative history of these provisions, though sparse, is instructive. In 1902, bills were introduced to ratify the Agreement negotiated with the Tribe in the previous year. The bill reported to the Senate, in addition to supporting approval of the Agreement, proposed an additional provision not originally negotiated: the inclusion of a requirement reserving Sections 16 and 36 in each township in Gregory County "for the use of the common schools" and granting those sections to the State of South Dakota. S. Rep. No. 662, 57th Cong., 1st Sess. 1-2 (1902). The bill was passed in the Senate, but the House Committee on Indian Affairs rejected not only the provisions permitting free-homesteads but also the school lands provision, stating (H.R. Rep. No. 2099, 57th Cong., 1st Sess. 1 (1902)).

> The opinion of the committee is that this section is *not necessary*, as under *existing law* sections 16

[14] A school lands provision was also contained in the Act of March 3, 1891, 26 Stat. 989, 1035, extinguishing the Lake Traverse Reservation. At that time, of course, this Court had not held that a State would be entitled to school sections out of public lands by the force of its Enabling Act alone, and Congress therefore included an express grant even in Acts providing for purchase of lands for a sum certain.

> and 36 would be granted to the State upon the extinguishment of the Indian title. [Emphasis added.]

The bill never reached the House floor for a vote (Pet. App. 16, n. 23).[15] When the Agreement for a sum certain was abandoned, however, subsequent bills included an express grant for school lands.

The question arose again in connection with the Act of 1910. Although the school lands provision was included in that Act without substantial debate, a similar provision in a bill to open lands in the Fort Berthold Reservation, North Dakota, was more fully discussed, The Fort Berthold bill, described as "practically in the same form" as the 1910 Rosebud Act (45 Cong. Rec. 5794 (1910)), provided for sales according to the

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[15] The 1901 Agreement was an outright cession of Gregory County for a sum certain, which the Tribe conceded below would have extinguished the reservation status of the land and restored it to the public domain (Pet. App. 16). See *DeCoteau* v. *District Court, supra*, 420 U.S. at 447-449. The House Indian Affairs Committee understood that, under such circumstances, it was *not* necessary expressly to reserve Sections 16 and 36 for school purposes because the South Dakota Enabling Act of 1989 provided that those sections would automatically revert to the State when Indian title was extinguished. See 25 Stat. 676, 679, Section 10. The Senate Committee Report, supporting inclusion of the provision, was issued in March 1902, *before* this Court's decision in *Minnesota* v. *Hitchcock, supra*. The House Report was issued on May 17, 1902, after the *Hitchcock* decision. Congress "must be deemed to have known" that the exact issue it was dealing with was resolved by this Court in *Hitchcock*. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 113. It was the House Report that accurately reflected existing law.

The court of appeals mistakenly relied (Pet. App. 29) on statements made by Senator Gamble in 1902 in favor of a school lands provision without noting that others regarded the provision as unnecessary. The court then juxtaposed those statements with statements made in 1904 (Pet. App. 30) after the sum certain method of payment had been discarded. The latter statements in fact simply emphasize the need to include school lands provisions when the uncertain-sum-in-trust method of payment is used.

uncertain-sum-in-trust method, except for Sections 16 and 36 which were to be purchased by the United States. After discussion of the school lands provision, Senator Jones of Washington stated (45 Cong. Rec. 6741 (1910)):

> I think I am thoroughly familiar with the terms of these various bills, and I am satisfied that these lands are *not restored to the public domain at all.* Their disposition is provided for in a special way. *The title of the Indians is recognized, and the lands are sold for the Indians.* They are to have the benefit.
>
> I am not going to object to the bill, and I am not going ot object to the provisions in it, but I did want to put in the RECORD my judgment that we are under *no obligation to purchase section 16 and 36, because we are not restoring these surplus lands to the public domain.* [Emphasis added.]

Senator Jones clearly recognized that the 1910 Fort Berthold Act, which was "practically in the same form" as the 1910 Rosebud Act, did not restore any lands to the public domain, and that Congress chose voluntarily to include a grant of school lands to provide schools in the opened territory.[16] The Eighth Circuit has held that the 1910 Fort Berthold Act did not diminish the exterior boundary of that Reservation. *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121. It is highly unlikely that Congress would have intended a different result in substantially identical legislation passed within the same month.

2. There is also no reason to believe that these lands, not restored to the public domain by Acts of Congress, were nevertheless restored by issuance of the Presidential proclamations opening the lands for settlement. At that point, the trust was still in full effect and the Indians had

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[16] Since the opened areas where to be populated largely by white settlers, this action seems consistent with the purpose of the school lands provisions in the States' Enabling Acts.

yet to receive any benefits under the particular Acts. Lands unsold or forfeited were to be restored to the Indians (presumably through the trust) and would not have been available for sale under the general laws. Thus they bear little resemblance to public lands.

This conclusion is fortified by *Ash Sheep Co.* v. *United States*, 252 U.S. 159. In 1899, the United States had negotiated an agreement with the Crow Tribe, by which the Tribe agreed to "cede, grant and relinquish" to the United States, for a lump sum, a portion of its reservation in Montana, 33 Stat. 352-356. In 1904, however, the Congress unilaterally "amended and modified" the unratified 1899 Agreement to include an uncertain-sum-in-trust provision, 33 Stat. 361 (Section 6), and a trusteeship provision, 33 Stat. 361 (Section 8), while retaining the "cede, grant, and relinquish" language of the 1899 Agreement. The land was opened by Presidential Proclamation in 1906, 34 Stat. (Part III) 3200, and "[m]uch thereof ha[d] been disposed of * * *." *United States* v. *Ash Sheep Co.*, unpublished opinion, Brief of the United States as Amicus Curiae in Support of Petition for Hearing and Rehearing en Banc, p. 66 (filed in the court of appeals).

In 1913, the Ash Sheep Company sought to graze sheep on unallotted lands opened for settlement without compliance with Interior Department regulations, claiming that the Act of 1904 had diminished the Reservation and converted the land affected into "public land." This Court disagreed, stating (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398. * * *

> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, *and that they did not become "Public lands"* in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352. * * *. [Emphasis added.]

Thus, the Presidential Proclamation of 1906 clearly had not converted the Indian lands into public lands outside the Reservation.

Furthermore, a bill (S. 4632) to give settlers additional time to make payments on lands within various North and South Dakota Reservations (including the Rosebud) was introduced and considered in the Sixty Third Congress in 1914. 51 Cong. Rec. 8790 (1914). During the House debate of May 18, 1914, the consequences of non-payment by the settlers was discussed (51 Cong. Rec. 8791 (1914)):

> Mr. FOSTER: I want to say to the gentleman from South Dakota, on the statement he makes that these lands will probably go back to the Government, and that these people are really in distress—
>
> Mr. MANN: The Government does not own these lands?
>
> Mr. BURKE of South Dakota: *The Government does not own them.* The Government is undertaking to dispose of these lands for the benefit of the Indians.

Mr. FOSTER: Certainly. I understand.

Mr. BURKE of South Dakota: *And instead of giving money to the Indians, under the agreement of 1889*, so far as these reservations in South Dakota are concerned, *the money goes into the Treasury*, and we appropriate it for the support and civilization of the Indians. [Emphasis added.]

The point was also emphasized later in the debate (*ibid.*):

Mr. FOSTER: * * * if at the end of the time they do not desire to pay for them, the land goes back to the Government.

Mr. MANN: *The land goes back to the Indians.* [Emphasis added.]

3. We believe that Congress expected by the Acts in question "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz* v. *Arnett, supra*, 412 U.S. at 496. While it might have been possible to diminish the reservation *pro tanto* as each plot of land was actually sold, that system seems both illogical and impractical. Under such circumstances Indians could not be sure from day-to-day what lands remained within the Reservation (and thus on what lands they became subject to state jurisdiction, see U.S. Department of Interior, *Federal Indian Law* 510-511 (1958)), and jurisdiction could only be exercised in checkerboard fashion according to local plat books. That cumbersome system should not be readily implied. *Seymour* v. *Superintendent, supra*, 368 U.S. at 358. Furthermore, the risk of forfeitures was always present given South Dakota's climate; the difficulties would only be increased as land, previously sold and removed from the Reservation, reverted to the trust upon nonpayment. Finally, the Indians living on the opened portion might be denied benefits available to Indians living on a Reservation.

By contrast, preserving the Reservation until the trust allotments expired would present fewer problems. The acquisition of land would not be impeded, for the settlers would own their land in the same manner and would be generally subject to state civil and criminal jurisdiction. *United States* v. *McBratnew*, 104 U.S. 621; *New York ex rel. Ray* v. *Martin*, 326 U.S. 496. The taxable base for the State and counties would be expanded, relieving the burdens of a locality previously inhabited largely by non-taxable Indians. At the same time, the Indians living on allotments would continue to receive needed federal benefits. While the State, of course, would not have jurisdiction over Indians on the Reservation, extension of State control over Indians has not generally been favored, *Rice v. Olson, supra.* This viewpoint is also consistent with treatment of the Reservation by the Department of the Interior, as we next discuss.

III. THE DEPARTMENT OF THE INTERIOR HAS ADMINISTERED THE ROSEBUD RESERVATION IN ACCORDANCE WITH THE BOUNDARIES ESTABLISHED IN 1

Although the State of South Dakota has asserted dominion over the opened portions of the Rosebud Reservation, the territory within the original boundaries of 1889 has been recognized and administered as a Reservation by the Department of the Interior.

1. The process of alienating "surplus" Indian lands pursuant to the allotment policy ended with the passage of the Indian Reorganization Act of 1934 (48 Stat. 984). *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 18. Under Section 3 of that Act, the Secretary of the Interior was authorized "to restore to tribal ownership the remaining surplus lands of any Indian Reservation heretofore opened * * *," 48 Stat. 984, and under Section 7, he was authorized to proclaim "new Indian reservations * * * or to add such lands to existing reservations."

48 Stat. 985. Congress made clear, however, that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads *upon the public domain outside the geographic boundaries* of any Indian reservation now existing or established hereafter" (48 Stat. 986; Section 8) (emphasis added).

The legislative history of the Act establishes that its provisions were directed particularly to "opened" portions of reservations. John Collier, Commissioner of Indian Affairs, whose agency was largely responsible for drafting the original bills, testified: [17]

> There have been presented to the House Indian Committee numerous land maps showing the condition of Indian-owned lands on allotted reservations. The Indian-owned lands are parcels belonging (a) to allottees and (b) to the heirs of deceased allottees. Both these classes of Indian-owned land are checker-boarded with white-owned land already lost to the Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.

Before the House Committee Commissioner Collier testifed[18]:

> * * Alienation under allotment takes place in a spotty way *throughout the entire area within the reservation*. Indian land is not lost in solid blocks. It passed into white hands in scattered parcels which increased year by year until the remaining Indian lands are checker-boarded by white lands. *In many areas they have shrunk to mere dots on the map surrounded by large areas of white land.*

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[17] Hearings on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18 (1934).

[18] Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 30-31 (1934) (emphasis added).

After passage of the Indian Reorganization Act of 1934 the unexpired trust period on all land allotted to Indians within reservations was indefinitely extended. The Secretary of the Interior was required to identify those Acts that "opened" portions of Indian Reservations but did not convert those lands into "public domain" (54 I.D. 559). The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that "[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation" (54 I.D. at 560.) However, the Secretary determined that a second type of disposition did not extinguish the Indian title and convert the land into public domain (*ibid.*):

> * * * [A]bout 1890 * * * there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company* v. *United States*, 252 U.S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 3, if in the public interest.[19]

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[19] Respondents' discussion of a 1938 opinion by the Acting Solicitor (56 I.D. 330), concerning the Colorado Ute Reservation. Reply Brief for Respondents' in Opposition, pp. 26-27, takes an opposite viewpoint, replying on language that "[t]he phrase 'of any Indian reservation' must be used in section 3 to describe the character and location of the lands at the time they were opened to disposal under the public land laws," 56 I.D. at 333. No mention is made, however, of the language in Section 8 that "[n]othing

The Secretary then proceeded to identify "a list of Indians to receive the proceeds of sale only as the reservations where the lands have been opened, the tracts are disposed of" (54 I.D. at 561).[20] In addition to the three Rosebud Acts of 1904, 1907 and 1910 (*id.* at 562), the Secretary listed some twenty-six other reservations.[21] While those reservations have been the source of continual litigation, not one court has ever held that the

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contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." That qualification, read in conjunction with Section 3, indicates that the only lands governed by the Indian Reorganization Act were lands located within an Indian reservation that were opened but not restored to the public domain. Such lands, as the Court held in *Seymour* and *Mattz*, were not removed from Indian and federal jurisdiction.

Moreover, the lands at issue in the Colorado Ute case did not contain any Indian allotments. Three bands of Utes occupied this Reservation prior to 1880; each was permitted to select allotments within the Reservation before it was opened by the 1880 Act, but because little arable land was available, the Uncompahgre and White River Utes were "voluntarily" removed to Utah. The Southern Utes were the only band to remain, and they selected allotments in the southern portion of the Reservation where the arable lands were located, *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 449, leaving the northern portion unallotted. The discussion by the Acting Solicitor, therefore, must be read in the context of these unusual facts. See also *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 423, 424-430.

[20] Approximately one month later, a supplemental order was issued which included additional reservations. It stated that (*id.* at 564) "as to those townsites any part of which remains unsold within such areas, it is hereby recommended that said order * * * be construed to apply to the extent of temporarily withholding from other disposition any unsold lots or portions of any such townsites * * *."

Thus, even townships, which by the 1930's would be populated by numerous non-Indians, were encompassed by this Interior Department order.

[21] See cases cited, note 10, *supra*.

Indian title to the land affected was extinguished by the applicable Act of Congress and the land converted to public domain. In fact, when the question presented was whether the reservation boundaries continued to exist undiminished in size, each court decided that they had.

On December 3, 1937, the Assistant Commissioner of Indian Affairs recommended to the Secretary of the Interior that, pursuant to Section 3 and Section 7 of the Indian Reorganization Act, certain undisposed surplus lands "of the Rosebud Reservation, South Dakota" should be restored to tribal ownership.[22] (App. A, *infra*). These lands included vacant lands totaling some 4,649.25 acres, and also "remaining vacant and undisposed * * * lots within the townsites of Wamblee, Witten and Wewela, in the opened portion of the said Rosebud Reservation,

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[22] The Secretary had previously approved the Constitution and Bylaws of the Rosebud Sioux Tribe (App. B, *infra*), pursuant to Section 16 (48 Stat. 987) of the Indian Reorganization Act. That section provides that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * *." Article 1 of the Constitution defined the Tribe's jurisdiction as "the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law." The Rosebud Sioux Tribe has had a law and order system since 1877, suported by Congressional appropriations. 19 Stat. 254, 257 (Art. 9). Its police force was organized in 1879, *Report of Commissioner of Indian Affairs*, 1879, p. 40, and the extensive nature of its law and order system was recognized by this Court in *Ex parte Crow Dog*, 109 U.S. 556. See also *Report of Commissioner of Indian Affairs*, 1881, p. 54. Congress authorized the establishment of Tribal Courts in 1888, 25 Stat. 233, and the Rosebud law and order system continued to function thereafter. *Report of Commissioner of Indian Affairs*, 1897, p. 277 and *Report of Commissioner of Indian Affairs*, 1890, p. 381. After the approval of the Tribal Constitution in 1935, the Tribal Government was reorganized, and the Tribe has continued to exercise jurisdiction throughout the 1889 Reservation over Tribal members. See App. C, *infra*.

which townsites were established by the Department, pursuant to authority contained in the Act of March 2, 1907, *supra*." *Id.* at 2A. The lands encompassed by this recommendation were in Tripp County, opened by the 1907 Act. On January 12, 1938, the Secretary issued an "Order of Restoration," restoring these lands to the Tribe (App. D, *infra*).[28]

2. Other actions confirm this view of the Rosebud Reservation as administered by the Department of the Interior. Department officials have repeatedly treated lands within Mellette, Tripp, Gregory and Lyman Counties, located within the 1889 Reservation boundaries, as reservation lands. This treatment belies the viewpoint of the court of appeals that Todd County alone has constituted the Rosebud Reservation since 1910.

For examples, in 1909, the Department, not having sold portions of the surplus lands made available by the 1904 Act to homesteaders, offered the remainder for sale at public auction. In a letter dated February 8, 1909, to the Commissioner of the General Land Office, the Secretary stated (37 I.D. 442-443):

> It is directed that *all that part of the Rosebud Indian reservation in Gregory County*, South Dakota, opened to settlement and entry by the act of April 23, 1904 (33 Stat. 254), which had not been entered prior to August 8, 1908, will be offered for sale * * *. [Emphasis added.]

The Department used similar language in 1913, directing sale of the lands opened by the 1907 Act:

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[28] On August 20, 1964, the Congress placed in trust status certain federal lands "on the Rosebud-Sioux Reservation," which included tract E. ½ of Section 35, T. 42 N., R. 33 W. 6th P.M. in Mellette County. 78 Stat. 560.

Restoration orders, comparable to the 1938 Rosebud Order, were issued for the Colville Reservation, pursuant to a Congressional directive, 70 Stat. 626 (1956), *Seymour* v. *Superintendent*, *supra*, 368 U.S. at 356, and the Klamath River Reservation, *Mattz* v. *Arnett*, 412 U.S. at 496, n. 17 and 505.

> Sir: It is directed that all that *part of the Rosebud Indian Reservation in Tripp County*, South Dakota, opened to settlement and entry by the act of March 2, 1907 (34 Stat. 1230), which had not been disposed of on April 1, 1913, will be offered for sale at public auction * * * [42 I.D. 292].

Communications between Department officials are to the same effect. In April 1913, the Acting Commissioner of Indian Affairs, C. F. Hauke, submitted to the Superintendent of the Rosebud School a request for a report on the possible consequences of reorganizing the administrative structure of the Reservation. C.A. App. IV, Doc. 41.[24] Replying to the request, the Superintendent discussed, among other things, the status of Indian allotments in the various districts (or counties) opened for settlement. He stated (App. IV, Doc. 42, p. 4):

> *These two Districts* [Little White River and Black Pipe (both in Mellette County)] are the most troublesome of any of the Districts *on the Reservation*. The Bad Lands are located largely in these Districts which makes it difficult to go from place to place on account of the bad roads. The Cut Meat District [Todd County] has about 1,332 allotments with 299,120 acres, and a few over 1,000 Indians to look after. While it seems to be a large District, still there is but very little leasing of our Indian lands or allotments, *it being in the closed portion of our Reservation*, and the allotments are most compact with small farms in the District. The Agency has some over 1,200 Indians to look after, and is one of the largest Districts, but the farmer is assisted materially by being located in the Agency. [Emphasis added.][25]

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[24] As used in this brief," "C.A. App." refers to the appendix filed in the court of appeals.

[25] This correspondence shows that the distinction between "closed" and "opened" portions of the Reservation is that non-Indians were formally permitted by Congress to enter the Reser-

That same year, the Supervisor of Industries and Agriculture for the Rosebud Reservation submitted a report to the Indian Office in Washington, D.C., regarding his inspection of portions of the Reservation. He stated (C.A. App. IV, Doc. 44, pp. 1-2):

> The reservation is divided into farmers' districts, and I believe an honest effort is being made to induce the Indians to farm; * * * In the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation* there is a Teacher in Charge residing at the Milk's Camp Day School. His duties are exactly the same as those of the additional farmers.
>
> Practically all of the day school teachers have been raising good gardens for a considerable time. * * * Except in the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation,* which is a farming district, I do not consider the Rosebud country a farming country. [Emphasis added.]

Moreover, the Report of May 13, 1914, from the Supervisor at Rosebud to the Honorable Cato Sells, Commissioner of Indian Affairs (App. IV, Doc. 51, p. 3), states:

> The [Rosebud] *reservation* is divided into seven farmer districts, each presided over by a farmer paid at a rate of $900 per annum, except the *Ponca district* [Gregory and Tripp counties] in the *extreme eastern end of the reservation,* which is presided over by a teacher-in-charge at $1000 per annum. [Emphasis added.]

Thus, the contemporaneous view of the Department officials was that the reservation boundaries were not changed by the Acts of 1904, 1907 and 1910.

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vation in one portion (*i.e.*, "opened") while not others (*i.e.*, "closed"). Both parts, however, were administered as the Rosebud Reservation.

More recently, in 1939, the Division of Forestry and Grazing of the Rosebud Reservation forwarded to the Commissioner of Indian Affairs a "map of the Rosebud Indian Reservation showing different types of roads" and identifying important landmarks regarding the location of the roads (*e.g.*, schools, fire look-out stations) (App. E, *infra*). The letter identifies roads and trails constructed by either the County or the Indian Service in Mellette, Tripp, Lyman and Gregory Counties; the location of new schools in Black Pipe (Mellette); the location of fire look-out tower sites in Cedar Butte (Mellette); and the construction of government and private telephone lines in Mellette and Tripp Counties. These facilities all were considered part of the Reservation.

In 1942, the Interior Department's Fish and Wildlife Service undertook a wildlife survey on the Reservation in order to assist the Tribe in managing their resources (App. F, *infra*). The Report on the survey was completed in August 1942 and transmitted to the Commissioner of Indian Affairs in September. The Report contains this description of the Rosebud Reservation (*id.* at 39A-40A):

> The *entire reservation* is included in Tripp, Gregory, Mellette, and Todd Counties, and covers a gross area of 3,555,833 acres. Alienated white lands total 2,468,888 acres of this area. Most of the field work was conducted on the *so called* "Dimished Reservation" in Todd County. This area, including alienated land, totals approximately 894,080 acres. Much of this is checkerboarded although there are some large solid blocks of Indian land. The largest percentage of the diminished reservation is Indian owned. Approximately 7,000 Indians are enrolled in the tribe. [Emphasis added.]

The Bureau of Indian Affairs continued, prior to this law suit, to administer all five counties as part of the Rosebud Reservation. From 1969 through 1974 requests

for Congressional appropriations were based on population statistics which included all Indians living within the exterior boundaries of the 1889 Reservation, and clearly distinguished those from a lesser number living off, but near the Reservation.[26] Various social services were provided to Indians living in all these counties, including child welfare and burial assistance; a BIA outpatient clinic is located in Mellette and Tripp Counties; and housing was provided by BIA or Tribal funding since 1963. Moreover, the Department of Housing and Urban Development, which makes grants only where a tribe has authority to act as a "governmental entity" or "public body" (42 U.S.C. 1460(h)), has been providing financial assistance to the Tribe (Memorandum of the United States as Amicus Curiae supporting petition for certiorari, p. 11). See also Opinion of the Field Solicitor on the exterior boundaries of the Rosebud Reservation in 1972 (C.A. App. IV, Doc. 56).

The agency responsible for administering the Rosebud Reservation, therefore, has greatly regarded the original reservation boundaries as unchanged by the Acts of 1904, 1907, 1910. That understanding is entitled to more weight than it was accorded by the court of appeals, *Mattz* v. *Arnett, supra,* 412 U.S. at 505, and, we believe, is more instructive than the ambiguous legislative history discussed in the following section.

IV. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT CONSIDER QUESTIONS OF JURISDICTION AND IS THEREFORE OF MARGINAL BENEFIT IN THIS CASE

The court of appeals gave primary, if not conclusive, weight to the legislative history of the three Acts (Pet.

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[26] See App. A, Brief of the United States as *Amicus Curiae* in the court of appeals below.

App. 9-60).[27] While legislative history may be useful in these inquiries, *DeCoteau, supra,* 420 U.S. at 444-445, we do not believe the history in this case merits the emphasis it enjoyed below. For Congress, in passing these three Acts, at no time addressed the question of jurisdiction. Page after page of the legislative history shows that Congress was concerned with *land* not *jurisdiction.* Thus, that history is at best a slender reed on which to support extinction of most of the Rosebud Reservation.

During the early 1900's there was no reason for Congress to be greatly concerned about jurisdiction. The principal reason for opening the Rosebud Reservation, as the court of appeals recognized (Pet. App. 9, 34, 44), was the desire of settlers for land. This desire was compatible with the interests of States having great reservations within their boundaries, who sought a broader tax base through increased land ownership by non-Indians (*e.g.,* A. 276). Both objectives could be accomplished either by purchase for a lump sum or by purchase through the uncertain-sum-in-trust method. At the same time, the Indians would be exposed to new, presumably more civilized, ideas that would hasten their assimilation into our culture. As that assimilation occurred, and the trust period on allotted lands gradually expired, the Reservations could be abolished. *Mattz, supra,* 412 U.S. at 496.

The debates reflect Congress' lack of attention to jurisdictional matters. Throughout the consideration of these three Acts, Congress discussed the desirability of the lands, the method of payment, the price to be paid by settlers, the need for school lands provisions, and many other matters, but not once addressed the issue of crimi-

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[27] A law journal article, written in part by present counsel for South Dakota, had previously reviewed the legislative history in some detail and urged the result reached below. Comment, *New Town, et al.: The Future of an Illusion,* 18 S.D. L. Rev. 85 (1973).

nal and civil jurisdiction within the opened Reservation.[28] Although the court of appeals relied on scattered remarks that suggest abolition of the Reservation, these remarks are necessarily taken from discussions on different subjects and are often contradicted by other references of a similar nature. While exhaustive citation is not necessary, a brief review of materials not cited by the courts of appeals should demonstrate the uncertainty surrounding the legislative history in this case.

1. The view of the legislative history taken by the court of appeals proceeds from the assumption that the Acts of 1904, 1907, and 1910 were extensions of the unratified 1901 Agreement (Pet. App. 22, 23, 25, 38, 40, 48). Although we agree that the 1901 Agreement and the three Acts had a common purpose of providing Indian lands to white settlers, the differences between them merit further attention.

In 1901, the Rosebud Sioux Tribe agreed by a three-fourths majority of the adult male population to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in all that part of the Reservation located in Gregory County, South Dakota, remaining unallotted, in return for a lump sum pay-

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[28] Jurisdiction is mentioned, albeit tangentially, in the debate on the liquor provision in the 1910 Act. That provision made all land in Mellette County subject to the liquor laws applicable in "Indian Country." Although the courts below suggested that the provision would be unnecessary if the Reservation were continued (Pet. App. 56-58, 102-103), that suggestion is erroneous. As the debates show, 45 Cong. Rec. 5460-5464 (1910), members of Congress were fully aware of this Court's decision in *In re Heff*, 197 U.S. 488, holding that Indian allottees were subject to *state* liquor laws. While opponents of the provision believed that state jurisdiction was sufficient, supporters noted that dependency on state liquor laws presented a grave risk to Indian well-being (45 Cong. Rec. 5460-5464 (1910)). Thus federal control was expressly continued for twenty-five years, the trust period on Indian allotments, at which time abolition of the Reservation could be considered.

ment of $1,040,000 (Pet. App. 14 and 15, n. 21). This agreement, which was negotiated by the Interior Department's Inspector, James McLaughlin, was to be effective "when accepted and ratified by the Congress of the United States" (id. at 15).[29] That ratification of course never occurred.

Three years later, after several previous bills had failed to pass, a new bill was introduced which unilaterally "amended and modified" the 1901 Agreement. The primary amendments were that (1) the Indians were not guaranteed a lump sum consideration, except for Sections 16 and 36 (school sections), but were to be paid as lands were actually sold (Section 6, Pet. App. 120); (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. App. 118 with Art. III, Pet. App. 115-116). In addition, the 1904 bill eliminated any reference to tribal consent by three-quarters of the male adults, and included a provision granting Sections 16 and 36 to the State for common school purposes (Section 4, Pet. App. 120). It was enacted on April 23, 1904, 33 Stat. 254.[30]

Although the court of appeals stated that "[t]he 1904 Act, incorporating the entire text of the 1901 Agreement (save for the lump-sum provision) passed under the circumstances [previously discussed], was obviously an outgrowth of and a continuation of the objectives of the 1901

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[29] Approval of three fourths of all the adult male Indians, before an agreement was considered valid, was required by the Treaty of 1868, 15 Stat. 635, 639 (Art. XII) (Pet. App. 14, n. 20).

[30] Despite these numerous and material changes the court of appeals somehow concluded that the 1904 Act "amended the 1901 Agreement solely with respect to the method of payment" (Pet. App. 23).

Agreement" (Pet. App. 25), that conclusion, while technically correct, is misleading. The 1901 Agreement itself does not evidence a specific intention to cut down reservation boundaries; at most, that intention could be presumed from the bilateral nature of the agreement and by the provisions for outright purchase of the lands for an indicated sum. *DeCoteau, supra.* That presumption is unavailing, however, once the nature of the agreement and the method of payment are changed. The objective of securing new lands for non-Indian settlers surely was continued, but that is not material to the question of jurisdiction over the settled lands.

2. The court of appeals also proceeded on the assumption that the terms "reservation" and "diminished reservation" had one settled, precise meaning throughout the legislative history. Thus, the court relied heavily on various references to the "reservation" and the "diminished reservation" (Pet. App. 12, 13, 14, 26-28, 39, 40-41, 44, 45, 51-52, 54, 57, 58, 59) to show that the exterior boundaries of the Rosebud Reservation had been cut back. Consideration of similar references in the legislative history, however, indicates that the terms were often used in shorthand fashion without the precision that the court of appeals supposed.

For example, the term "diminished reservation," as used in the 1910 Act, appears to include not only Todd County (the closed portion) but also Mellette County (the portion to be opened). The May 30, 1910 Rosebud Act provides in part, 36 Stat. 449 (Section 1):

> [A]ny Indians to whom *allotments* have been made *on the tract to be ceded* [Mellette County] may, in case they elect to do so *before* said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation* * * *. [Emphasis added.]

Section 2 of the Act, however, directs the Secretary to dispose of the unallotted lands in Mellette County after a presidential proclamation, provided (*ibid*):

> That prior to said proclamation the *allotments within the portion* of the said Rosebud Reservation *to be disposed of* [Mellette County] as prescribed herein shall have been completed * * *. [Emphasis added.]

Since the Indians could select new allotments in Mellette County prior to the presidential proclamation, as well as in Todd County, "diminished reservation" seems to refer not merely to the closed portion of the Reservation but to the " 'area of the reservation * * * diminished in size by reason of the settlement of the unalloted lands by non-Indians.' " *Putnam v. United States*, 248 F. 2d 292, 295 (C.A. 8). In *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, 687 (C.A. 8), the court of appeals recognized that a similar use of the term could mean that "the reservation * * * retained its original exterior boundaries even though the portion held by Indians was diminished by virtue of the sale of lands within the boundaries to outsiders. The court then continued: "Indeed, this would be consistent with 18 U.S.C. § 1151 defining Indian Country as lands within the limits of a reservation *notwithstanding the issuance of any patent*" (*ibid.*; emphasis in original).[31]

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[31] In a November 12, 1910, letter regarding the 1910 Act, the Assistant Commissioner of Indian Affairs stated (C.A. App. IV. Doc. 40B):

"The diminished reservation,—that is, the lands remaining *after* the allotments [to Indians] and sale of lands [to homesteaders] referred to, *will consist of about 40 townships*, which may be used to provide allotments until such time as there are no unallotted lands therein." [Emphasis added.]

In 1910 Mellette County consisted of 837,125 acres (36 full townships) and a number of irregularly sized townships. Thousands of these acres had already been allotted to Indians *prior* to the opening, and could not "be used to provide allotments * * *"

At other times, "diminished reservation" seems to mean only the closed portion of the Reservation. The Report prepared by the Fish and Wildlife Service in 1942 (App. F, *infra*, at 39A), for example, states that "[t]he entire [Rosebud] reservation is included in Tripp, Gregory, Mellette, and Todd Counties," and notes that "[m]ost of the field work was conducted on the so called 'Diminished Reservation' in Todd County." This is the same portion of the Reservation that the Superintendent of Rosebud School described as "the closed portion of our Reservation * * *" (*supra*, p. 35).

Construction of the term "reservation" also leads in various directions. While some references to the Rosebud "reservation" appear compatible with the court of appeals' analysis, other references do not. Thus, within a year after the 1904 Act was passed, the homesteaders in Gregory County petitioned Congress for an extension of time to establish their residence upon lands opened to settlement. The Senate and House Committee Reports both refer to the lands in question as "*lands within the confines of that part of the Rosebud Indian Reservation* thrown open to entry * * * (emphasis added). H.R. Rep. No. 4198, 58th Cong., 3d Sess. (1905); S. Rep. No. 2760, 58th Cong., 3d Sess. (1905) And, after describing the need for the legislation in light of bad

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after the opening. To find "about 40 townships" available for allotment, therefore, it would be necessary go beyond Mellette County.

In 1911, a few months after Mellette County was opened to settlement, there existed in Todd County less than 220,000 acres that could "be used to provide allotments * * *" to Indians, S. Rep. No. 1166, 62d Cong., 3d Sess. 4 (1913), the remainder having long since been allotted or reserved for agency and school purposes. The remaining 700,000 acres referred to by the Assistant Commissioner appears to have been an estimate from existing Department records of the land remaining throughout the entire 1889 Reservation for the purpose of allotment, "diminished" by the lands already alloted to Indians or occupied by homesteaders.

climatic conditions causing delays in payments by homesteaders, the Senate Committee Report states (*id.* at 2):

> A further fact which influences the committee in making a favorable report is that these settlers are under conditions different to those affecting the ordinary homestead settler. Entrymen on the reservations in question have to pay $4 an acre in the case of the Rosebud Reservation * * *.

This legislation became law on February 7, 1905, 33 Stat. 700.

On March 3, 1909, Congress enacted an appropriation for the Indian Department for the fiscal year ending June 30, 1910. 35 Stat. 781. Under Section II of the Act, Congress made appropriations for reservations within various states, including South Dakota. 35 Stat. 808. Additionally, Congress authorized the Secretary to permit the establishment of catholic missions "on the Rosebud Reservation." 35 Stat. 809. The missions were to be located as follows (*ibid.*):

> *On the Rosebud Reservation*, at or near Saint Francis Mission * * *; also, at or near Red Leaf Camp * * *; also, at or near Oak Creek * * *; also, at or near Antelope Creek * * *; also, at or near Little White River * * *; *also, at or near Ponca Creek*. [Emphasis added.]

Ponca Creek is located in Gregory County, opened by the Act of 1904.

In 1911 Congress had before it a bill for relief of settlers in the area opened by the Act of 1907. Representative Stephens, who called up the bill, described it as a "bill (H.R. 13044) extending the time of payment to certain homesteaders in the Rosebud and other Indian reservations in South and North Dakota * * *" (47 Cong. Rec. 3840 (1911)) and then stated (*id.* at 3841):

> Mr. Speaker, we have gone at some length into the question of the great drought-striken country of the West in the bill which has already passed the House and we have shown the House beyond all question that a severe drought has extended all over the West, including South Dakota. *The Rosebud Reservation, where these lands are situated,* is now, in the main, in the hands of settlers * * *. [Emphasis added.]

The bill became law on April 17, 1911, 37 Stat. 21.

In 1918, Mr. Gandy, a representative from South Dakota, introduced a bill (H.R. 12082) ("authorizing the sale of certain lands in South Dakota for cemetery purposes." 56 Cong. Rec. 6469 (1918). The bill was referred to the Committee on Indian Affairs, which reported (H.R. Rep. No. 742, 65th Cong., 2d Sess. 1 (1918)):

> This is a bill to authorize the sale of 10 acres of tribal land *on Rosebud Indian Reservation in Mellette County S. Dak., and belonging to the Rosebud Tribe of Indians,* to the White River Cemetery Co. * * * It is provided that the Secretary of the Interior shall sell the land * * * and that the money received shall be deposited in the Treasury of the United States to the credit of the Rosebud Tribe of Indians. [Emphasis added.]

In the following year, during debate on a bill to pay for fire damages on the Todd County portion of the Rosebud Reservation, 58 Cong. Rec. 4933 (1919), Mr. Gandy observed that "[t]he Rosebud Reservation embraces about 7,000 square miles." However, Todd County, which the Eighth Circuit found to be the *only* portion of the original Rosebud Reservation remaining in 1919, is less than 1,500 square miles (approximately 800,000 acres). The 1889 Rosebud Reservation, undiminished in size, is in excess of 5,000 square miles (3,228,160 acres).

In December 1910, the Town of White River, located in Mellette County, South Dakota, sought approval from the Federal Power Commission for construction of an electric power line across Indian lands. The FPC notified the Town that if "tribal Indian lands are to be crossed * * * prior approval of the proper reservation authorities" was required (App. G, *infra,* p. 41A). The FPC then notified the Secretary of the Interior that the "Town of White River, South Dakota, has filed with the Commission an application for license * * * affecting lands of the United States within the Rosebud Indian Reservation" (App. G, *infra,* p. 42A). Thus, both the Town of White River and the FPC acknowledged that power line construction in Mellette County would affect lands within the Reservation and was subject to approval of "reservation authorities."

In June, 1941, the United States filed a Declaration of Taking in the United States District Court for the District of South Dakota, in order to acquire land "for the use of the United States of America, * * * in connection *with the Two Kettle Project on the Rosebud Indian Reservation in South Dakota* * * *" (App. II, *infra,* pp. 44A, 50A) (emphasis added.) The lands acquired were described the District Court as (*id.* at 50A)

> * * * containing 610.10 acres of land, more or less, *in Mellette County,* South Dakota, designated as Tract No. 189 of the Two Kettle Project *on the Rosebud Indian Reservation* [Emphasis added.]

The District Court entered its Findings of Fact and Conclusions of Law, as well as its final judgment, on December 12, 1941 (*id.* at 44A).

In 1945 Senator Bushfield, a Senator from South Dakota, introduced a bill (S. 1564) directing the Secretary of the Interior to issue a fee patent to Shadrick Ponca, a Rosebud Sioux Indian. The relevant Committee Report stated (S. Rep. No. 1442, 79th Cong., 2d Sess. 1 (1946)):

> Shadrick Ponca, is the sole heir of his deceased mother, Millie or Wing Ponca, who bequeathed to him her allotted lands *on the Rosebud Indian Reservation, S. Dak., described in this bill, which lands are situated in Gregory County, S. Dak.*, a distance of more than 50 miles from applicant's home in the village of Okreek, in Todd County, S. Dak., where applicant, Shadrick Ponca, lives in his own home * * *[32]

Two years later, Senator Bushfield asked the Commissioner of Indian Affairs for a report on the application of Charlotte Gordon Odden for a patent in fee covering her allotment in Tripp County, South Dakota. The Commissioner stated in his letter of August 21, 1947 (App. I, *infra*):

> Receipt is acknowledged of your letter of August 11 about Mrs. Charlotte Gordon Odden's application for a patent in fee covering her 160-acre allotment, No. 4248, *on the Rosebud Reservation, described as* the SW ¼ sec. 11, T. 96N., R. 74W., 5th P.M., *Tripp County, South Dakota.* [Emphasis added.]

The inconsistency in these references is not surprising in view of the fact, discussed previously, that Congress did not squarely face the question of jurisdiction over the opened lands; other more controversial matters claimed its attention. It is inappropriate, therefore, to select certain statements from the mass of ambiguous materials and draw inferences from these, as the courts below did.[33]

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[32] The bill was passed by the Senate on June 14, 1946, 92 Cong. Rec. 6920, introduced into the House, 92 Cong. Rec. Rec. 7120, and referred to the House Committee on Indian Affairs. 92 Cong. Rec. 7399-7400. There was no further action during the 79th Congress, and although the South Dakota Senator introduced it again in the 80th Congress, 93 Cong. Rec. 3219 (1947), it did not become law.

[33] We also think the court of appeals misapprehended the significance of the fact that non-Indians and Indians live within the

Read in its entirety, the legislative history does not show a clear intent to cut back the Reservation boundaries.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

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SEPTEMBER 1976.

Reservation and utilize State and Federal facilities or benefits. Neither fact is inconsistent with the continued existence of the Rosebud Reservation. Only 19% of the Flathead Tribe live within the Flathead Reservation in Montana. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452, 457, n. 5 (D. Mont.), and considerable expenditures by both the State and Federal governments within the area provide benefits to all residents. *Confederated Salish and Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1313-1314 (D. Mont.). Similarly, the entire City of Tacoma, Washington, is within an Indian Reservation (Brief of the United States as Amicus Curiae in Support of Petition for Rehearing and Rehearing en Banc, p. 95 (filed in court of appeal); see also *United States* v. *Washington*, 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032), and this Court recognized the presence of non-Indians within the Colville Reservation. *Seymour* v. *Superintendent, supra*, 368 U.S. at 358-359. This pattern represents nothing more than the logical consequence of Acts "opening" Indian reservations to white settlement around the turn of the century.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1253

HERMAN S. SOLEM, WARDEN, and MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The special relationship of the United States to the Indian Tribes is too familiar to require restatement. It precedes the Constitution, was confirmed by it, and is evidenced in a long course of treaties and Executive Orders. The attendant national powers and duties are particularized in a multitude of Acts of Congress. Of immediate relevance here is the status of a remnant of the Great Sioux Reservation—itself established by treaty in 1868 and later reduced and broken up into segments by congressional legislation in 1889—as it may have been

further diminished by an Act of 1908. The result will affect, inter alia, the continuing federal responsibility for law enforcement within the disputed area under 18 U.S.C. 1152 and 1153.

In light of this continuing federal interest, the Court invited the Solicitor General to file a brief expressing the views of the United States at the jurisdictional stage. Now that the case is to be heard on the merits, we deem it appropriate to make a further submission.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* Pet. App. A2-A3.[1] After Bartlett's request for post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2 n.1), he filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. (Supp. V) 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute

[1] The Reservation was once part of the Great Sioux Reservation, established by the Treaty of Apr. 29, 1868, 15 Stat. 635 *et seq.*, from which the Black Hills area was taken in 1877. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.* The Cheyenne River Reservation emerged as a separate unit in 1889, when another substantial portion of the large Reservation was ceded and the remainder was carved up into six distinct Reservations. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589 (1977). As defined in 1889, the Cheyenne Sioux Reservation comprised about 2.8 million acres. The area opened in 1908 embraces some 1.6 million acres.

him rested with the Sioux Tribe or the federal government. The State of South Dakota, on the other hand, argued that the 1908 Act terminated the reservation status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.[2]

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973), and *United States* v. *Dupris*, 612 F.2d 319 (1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[3] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Supp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[4] The court declined to overrule

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[2] It was correctly assumed by both parties that, having chosen not to invoke the option offered by Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*, as amended in 1968, now 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360), South Dakota could exercise no criminal jurisdiction over a tribal member within "Indian country," which includes alienated parcels embraced by federally recognized Indian Reservations. See *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *John*, 437 U.S. 634 (1978).

[3] *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[4] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South

United States v. *Dupris*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson*, were consistent with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue before the Court is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 (1979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

In this situation, there would normally be no occasion for further review. In *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz*, *DeCoteau* and *Rosebud*, this Court announced the governing guidelines. These have remained unchanged. As the Court was at pains to declare in *DeCoteau* (420 U.S. at 447), "[w]e adhere without qualification to both holdings [*Seymour* and *Mattz*] and the reasoning of those decisions." No one can doubt that the court below has been meticulous in its attempt faithfully to apply those standards in each situation. It was, we stress, the Eighth Circuit that first found diminishment in the case of the Rosebud Reservation. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87 (1975), aff'd, 430 U.S. 584 (1977). The court of appeals was then credited with a "careful and comprehensive opinion." 430 U.S. at 585. After giving the matter equally full consideration on three occasions, it cannot be faulted for reaching a different result, on different facts, in the case of the Cheyenne River Reservation.

We cannot suppose this Court is now inclined to reconsider its own decisions and to revisit every lower court ruling implementing them—especially those previously cited with approval.[5] Acquiescing in that invitation—apparently tendered by petitioners—would impose an awesome burden and entail very unsettling consequences for all concerned, Indians and non-Indians alike. Rather, we assume the Court has determined to review the present case because of the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell*, 256 N.W.2d 117 (1977); *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the ruling of the federal appellate court as settling this issue of federal law. Apparently, the South Dakota Supreme Court was most recently emboldened (in *Janis*) by this

[5] In *Mattz*, this Court listed the 1908 Act involved here as an example of an "opening" statute that did not work disestablishment and approvingly cited the Eighth Circuit's *Condon* decision, followed in this case. 412 U.S. at 497 n.19, 505 n.23.

Court's action (446 U.S. 980 (1970)) vacating the Eighth Circuit's *Dupris* decision as probably moot.[6] See 317 N.W.2d at 137-138. At all events, now that the Court has granted review, it is to be hoped that a clear message will emerge, discouraging other state courts from prolonging disruptive controversies over the status of Indian Reservations. We urge the Court to re-affirm the controlling standards and to conclude that they were correctly applied by the court of appeals.

A.

We begin by re-examining the Court's past decisions in an attempt to distill the general principles that govern issues of Reservation "termination," "disestablishment," or "diminishment." The critical question remains whether the statute invoked worked an immediate and irrevocable cession, or merely opened up a part of the Reservation to purchase by settlers, with the expectation that, in due course, the entire opened area would be acquired and then separated from the remaining Indian territory. Our submission is that where such an opening scheme substantially failed and a significant portion of the opened lands remained unsold when Congress changed policy and halted sales, the area retains Reservation status.

B.

Applying these guidelines to the present case, we conclude that the Cheyenne River Reservation has not been disestablished or diminished. The Act of 1908 involves no outright cession, nor even any agreement by the Tribe. It is, rather, a typical "opening" statute, indistinguishable from the legislation considered in *Seymour* and *Mattz*. And, unlike the result in *Rosebud*, most of the

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[6] On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris. 664 F.2d 169 (1981).

opened lands were never sold and were ultimately "restored" to full Reservation status. In other respects, also, the opened area of the Cheyenne River Reservation has remained Indian. In these circumstances, it seems consistent with both the historic intent of Congress and more recent legislative policy to preserve the original boundaries of the Reservation.

ARGUMENT

A. The Governing Principles

1. In considering questions relating to the "termination," "disestablishment" or "diminishment" [7] of Indian Reservations, we must remember that they almost inevitably arise out of congressional legislation enacted near the turn of the last Century, a time when the Political Branches were wholly committed to a policy designed, in due course, to liquidate the Reservation system and accomplish the assimilation of the Indian. The first step, exemplified by the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, was to encourage—and shortly to compel—the Indian to abandon his roaming habits, his communal life, his "tribalism," and to become a self-sufficient farmer, tied to a homestead.[8] To that end, property ownership was to be individualized,

[7] Like Petitioners, we speak of "diminishment" as synonymous with "disestablishment" and "termination," but as applied to a discrete portion, rather than the whole of the Reservation. So used, all three terms imply that the affected area has entirely and permanently lost its Reservation status. In the case of "diminishment," the affected portion is jurisdictionally removed from the subsisting Reservation, whose boundaries are redrawn to exclude that area. It does not, of course, follow that the same meaning should be attributed to the word "diminished" whenever it occurs in Legislative or Executive Branch documents.

[8] There were, to be sure, much earlier experiments with allotment, mainly with the same objectives as the later legislation. But few such plans were fully carried out. See F. Cohen, *Handbook of Federal Indian Law* 98-102, 129-130 (1982 ed.).

and the not unimportant side benefit of allotting the Reservation land among the members would be to open up the substantial "surplus" to white settlers. Although the precise mechanisms varied, the ultimate objectives were always the same: "educating" and "civilizing" the Indian, relieving the federal Treasury of burdensome annual subsidy payments, and releasing "unneeded" tribal land for exploitation by others. In every case, moreover, the expectation was that, sooner or later, perhaps within a generation, the Tribe and its Reservation would cease to exist. See generally, F. Cohen, *Handbook of Federal Indian Law* 206-217 (1942); J. Kinney, *A Continent Lost—A Civilization Won* (1937); D. Otis, *History of the Allotment Policy*, reprinted in Hearings on H.R. *7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., Pt. 9, at 428 *et seq.* (1934). See also, *Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

This perception might lead us to view as disingenuous all attempts at pursuing the exact intent of Congress in the period of 1890 to 1910 when it allotted and opened up particular Reservations. Disregarding fine points, one might be tempted to rush to the conclusion that the Congressional purpose was plain enough in each instance: termination or "disestablishment" of the Reservation, merely preserving for a limited time in protected status individual Indian homesteads. The upshot of this indiscriminate approach would be to end the Reservation status of every Reservation that has ever been allotted—some four-fifths of the total.[9] While individual allotments held

[9] According to one compilation, of the 229 Indian Reservations existing in 1936 (which comprised approximately 136 million acres in 1887), only 48 (totalling about 22 million acres) escaped allotment and opening up. With the notable exception of the Navajo Reservation (encompassing some 16 million acres in 1936), most of the unallotted Reservations were relatively small. See J. Kinney, *A Continent Lost—A Civilization Won*, App. at 350 (table), 351-356 (table) (1937).

in trust or subject to restrictions would continue to be "Indian country" (see 18 U.S.C. (Supp V) 1151(b)), the territorial integrity of most Reservations would be destroyed, tribal governments would lose much of their reason for being, and all the problems associated with "checkerboard" jurisdiction would emerge.

To acquiesce in these results would break many solemn treaty promises made to the Indian, and, at this late date, the unsettling effect would be extreme. But the dispositive consideration is that reading an intent immediately to disestablish into every turn of the century statute providing for the allotment and opening up of Indian Reservations would attribute to Congress and the Executive a more callous disregard of Indian welfare than the record justifies. Latter-day popular history exaggerates when it portrays the Government of the United States as wholly captive to the "familiar forces" of the times, ready to take the Indian's land by any means and without concern for his fate. As this Court stressed in *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973), although elimination of separate Reservations was the *ultimate* goal, the actual consequence of allotment was often to "continue the reservation system" for a limited time. See, also, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976).

So, also, to hold that all Reservations opened up in this period were then permanently disestablished would trivialize the effect of the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. V) 461 *et seq.* (IRA), and more recent legislation, which radically changed our approach to Indian affairs. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-158 (1973); *Mattz*, 412 U.S. at 496 & nn.17 and 18; *Moe*, 425 U.S. at 472-478; *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976). Except as it is unavoidable, we ought not conclude that the remedy came too late for most Indians and most Reservations. This Court "cannot remake history." *DeCoteau* v. *District County Court*, 420 U.S. 425, 449

(1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615 (1977). But, where implementation was not completed, the Court need not carry forward into the 1980s a policy so firmly repudiated by Congress since the 1930s. See *Moe*, 425 U.S. at 478-479.

This is not "revisionism." As early as 1884 this Court entertained "no doubt" that, until the lands opened to settlers were sold, the Indians remained the equitable owners and that such areas could not be deemed "public lands." *United States* v. *Brindle*, 110 U.S. 688, 693 (1884). A few years later, the reserved status of similar lands was held to defeat a state's claim to included school sections. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394-402 (1902).[10] See, also, *United States* v. *Thomas*, 151 U.S. 577 (1894); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906). By 1909, the Court had established a presumption against termination or diminishment of Reservations and the elimination of the protective federal umbrella. *United States* v. *Celestine*, 215 U.S. 278, 285-287, 290-291; *United States* v. *Sutton*, 215 U.S. 291, 294-295. See, also, *Spalding* v. *Chandler*, 160 U.S. 394, 403-405 (1896). And, in the next three decades, there followed a host of decisions reflecting the same solicitude to maintain the special status of Indian land. *E.g.*, *Hollowell* v. *United States*, 221 U.S. 317 (1911); *Choate* v. *Trapp*, 224 U.S. 664 (1912); *Ex parte Webb*, 225 U.S. 663 (1912); *Donnelly* v. *United States*, 228 U.S. 243 (1913); *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Sandoval*, 231 U.S. 28 (1913) (disapproving *United States* v. *Joseph*, 94 U.S. 614 (1877)); *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Nice*, 241 U.S. 591 (1916) (overruling *In re Heff*, 197 U.S. 488 (1905)); *United*

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[10] Unlike some later opening legislation, the 1889 Act involved in *Minnesota* did not contain a special "school provision," stipulating outright purchase by the United States of Sections 16 and 36 and conveyance to the State. See n.14, *infra*.

States v. *Soldana*, 246 U.S. 530 (1918); *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); *United States* v. *McGowan*, 302 U.S. 535 (1938).

These early precedents make clear that the Court was adhering to a consistent approach when, more recently, it expressly affirmed the principle that allotment and opening up of tribal lands does not presumptively end the Reservation or reduce its boundaries. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 478-479. That remains the rule today, as the Court summed it up in *DeCoteau*, 420 U.S. at 444:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine*, 215 U.S. 278, 285. The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter v. Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate * * * be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U.S., at 505. See also *Seymour* v. *Superintendent*, 368 U.S. 351, and *United States* v. *Nice*, 241 U.S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land

> by the settlers are placed in trust by the Government. *Mattz* v. *Arnett, supra,* and *Seymour* v. *Superintendent,* supra.

See, also, *Rosebud,* 430 U.S. at 586-587 ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."); cf. *United States* v. *John,* 437 U.S. 634 (1978).

To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation must be found to have been irrevocably terminated or diminished. See pp. 14-17, *infra.* But the teaching of this Court over three-quarters of a century remains that such a finding requires very clear evidence of congressional intent to effect a present—and not merely an eventual—dissolution or dismemberment of the Reservation. In assessing that intent, we must of course be attentive to the contemporary understanding. But, again, it is essential to distinguish future expectations from immediate consequences.[11]

2. How then do we distinguish betwen action effectively ending the Reservation status of the whole or a part of recognized Indian lands and a mere opening up of such lands? As we have said, legislation enacted be-

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[11] In this context, it is important to remember that the only parties to any cession were the Tribe and the United States. Future settlers, albeit intended beneficiaries, can claim only what the Congress secured, not some larger immunity they may have supposed would attach to their acquisition of surplus Indian land. At all events, the "legitimate expectations" of white settlers can be accommodated without destroying the Reservation status of opened areas. See *Montana* v. *United States,* 450 U.S. at 559-561 & n.9. But, whatever the equities may be in favor of individual holders of "fee" parcels who are challenging Reesrvation ordinances, no comparable claim can be asserted by the state and its counties. They plainly were not parties, directly or indirectly, to any agreement or legislation touching the status of the Reservation. The interest the states and counties now assert—seldom clearly articulated—cannot help us in determining the original understanding.

tween 1890 and 1910 was written, often carelessly, in the expectation that the entire Reservation system would be dismantled within a relatively short span. And it is equally clear that "Reservation status" for alienated lands was not yet a familiar concept.[12] Accordingly, we should not be surprised, in most cases, to find no express legislative discussion of Reservation status or Reservation boundaries as affected by opening up of tribal lands for sale to settlers. In the climate of the times, the only meaningful question is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.

a. In the treaty days, before 1871, such cessions were, of course, quite frequent. Even though part or even the whole of the "price" was often to be paid in installments (whether in money or in kind, or both) over several

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[12] At the time, the usual focus was as to whether former tribal lands remained "Indian country" for purposes of exercising federal criminal jurisdiction and prosecuting violations of federal liquor law that were restricted to "Indian country." The prevailing view was that fully alienated tracts, including unrestricted allotments of tribal members, ceased to be "Indian country." *E.g., Bates* v. *Clark*, 95 U.S. 204 (1877); *Dick* v. *United States*, 208 U.S. 340 (1908); *Clairmont* v. *United States*, 225 U.S. 551 (1912). It was only in 1932 (Act of June 28, 1932, ch. 284, 47 Stat. 336 *et seq.*) that ceded rights-of-way across Reservations were included, and in 1948 (see 18 U.S.C. 1151(a)) that all lands within a Reservation, including those patented in fee, were declared "Indian country." The question of *tribal* jurisdiction over non-Indians on alienated parcels within the Reservation was not then a live issue, except in the case of the Civilized Tribes of the Indian Territory. There, however, tribal taxing authority over activities in alienated town sites was sustained. *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). See, also, *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904), citing with approval an Attorney General's opinion upholding tribal taxation of hay exports from the Reservation even if the non-Indian taxpayer were "the absolute owner of the land on which the hay was raised." This history is recounted in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-144 (1982).

years, the typical treaty cession leaves no doubt that the transfer was complete upon ratification. *E.g., United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920).[13] Like "cessions," expressly so termed, were subsequently accomplished by formal "agreement," incorporated in Acts of Congress. That was the form of the transaction by which the Black Hills were severed from the Great Sioux Reservation in 1877, and much other land in 1889. See Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.*; Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* Similar cession agreements effected the disestablishment of the North Half of the Colville Reservation and the termination of the Lake Traverse Reservation. See *Seymour*, 368 U.S. at 355; *DeCoteau*, 420 U.S. at 455; *id.* at 455-460 (App. A to opinion). And there are many other instances. See, *e.g., Mattz*, 412 U.S. at 504 n.22; *DeCoteau*, 420 U.S. at 439-440 n.22. See, also, the Act of June 6, 1900, ch. 813, 31 Stat. 672 *et seq.*, upheld in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

Sometimes, to be sure, the purported "agreement" had not been approved by the requisite number of tribal members stipulated in an earlier treaty, or consent had been induced by questionable methods. *E.g.*, the case of the Black Hills, discussed in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 381-382 & n.13 (1980). But, in light of *Lone Wolf*, that is irrelevant to our inquiry. The critical fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment, even if inade-

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[13] Even then, there were exceptions. Some treaties provided for payment of "ceded" lands, at least in part, by turning over to the Tribe the proceeds of sale received from settlers. In such cases, the Court characterized the cession as incomplete until the tracts were sold, holding that the Indians remained the equitable owners and that the ceded area should not be deemed "public lands." *E.g., United States* v. *Brindle, supra.*

quate or delayed. Although, usually, the Government immediately opened the area to settlers, the Indians, having irrevocably and completely divested themselves of title for a fixed price, had no interest in those subsequent events.

b. On the other hand, during the decade preceding and especially that following 1900, there were more numerous arrangements under which the United States, with or without the formal concurrence of the Tribe, opened up tribal lands to sale without any firm obligation to do more than credit or pay over the proceeds to the Tribe when realized.[14] In effect, the Government was a mere sales agent. No doubt, the primary motive for resorting to this type of scheme was to avoid committing the United States to any independent financial obligation.[15]

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[14] There was, commonly, a special exception for "school sections" within the opened area, which were purchased outright by the United States and conveyed to the state. See, *e.g.*, Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 *et seq.*, quoted in the following note. But, as *Ash Sheep* makes clear, such a provision has no effect on the continuing Indian status of the remaining lands opened up. See pp. 17-19, *infra*. The Court reiterated this view as recently as *DeCoteau*, 420 U.S. at 445-446 n.33: a "school provision" of this kind "implies nothing about the presence or absence of state civil or criminal jurisdiction over the remainder of the ceded lands." A sufficient example is the Crow Allotment Act of June 4, 1920, ch. 224, § 16, 41 Stat. 756, which provided for the purchase by the United States and grant to the State of Montana of Sections 16 and 36 within the Crow Reservation. No one has ever contended that this legislation affected the status or boundaries of the Reservation. See *Montana* v. *United States*, 450 U.S. at 548. Since Montana was admitted by the same Enabling Act as South Dakota, we must assume the Court was misled in *Rosebud* in suggesting that implementation of an Enabling Act school section grant within Indian country implies disestablishment of the affected portion of the Reservation. See 430 U.S. at 599-601. In our view, *DeCoteau* correctly concluded that a school section provision is wholly neutral on the issue of disestablishment.

[15] An express statement of this concern is reflected in Section 8 of the Crow Agreement, incorporated in the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 361, quoted in *Ash Sheep*, 252 U.S. at 165-166:

And it was presumably anticipated that, in due time, all tracts would be sold and that the upshot would be the same as in the case of a straightforward cession. But, until that day, the transfer was incomplete.

Unsurprisingly, the clear line between outright cession and mere opening up of tribal lands was not always observed. As *Rosebud* illustrates, Congress sometimes combined features of both schemes in a given case. Thus, the 1904 Act affecting a portion of the Rosebud Sioux Reservation grew out of a straightforward cession agreement with the Tribe, but the payment provisions were transmuted by the Congress so as to resemble a typical opening up arrangement. See 430 U.S. at 590-598. In part because the immediate cession language was retained in the first statute (*id.* at 591, 596-597) and because the later Acts of 1907 and 1910 were seen as derivative legislation, carrying forward the same "baseline" objective (430 U.S. at 605-615), the Court concluded that an intent immediately to diminish the Reservation must be found. But we do not read *Rosebud* as erasing the traditional distinction.[16] The rule of *Seymour* and *Mattz* has not

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That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend any pay over the proceeds received from the sale thereof only as received, as herein provided.

This was a standard provision in opening up legislation, including the 1908 Act now before the Court. See Pet. Br. App. A14-A15.

[16] Notwithstanding what was written in *Rosebud*, 430 U.S. at 613-614 & n.47, we fail to appreciate the significance for Reservation status of a provision prohibiting the introduction of liquor into an "opened" area for twenty-five years—at least when, as there and here, it encompasses "land allotted, those retained or reserved," as

been repudiated and presumably continues to govern in any like situation.

3. The immediate consequences of opening up legislation not involving an unconditional present cession are clear enough. Putting aside allotments selected in the opened area and any school sections purchased outright for the state, the Tribe retained its beneficial title to the land until sold, as well as the right to any profits derived from their use. Only Indian occupancy rights were suspended—so that the land could be offered, more invitingly, with "vacant possession." In sum, as this Court repeatedly held in a series of cases including *Brindle, Mille Lac Band of Chippewas, Minnesota* v. *Hitchcock* and *Ash Sheep*, while unsold, such opened lands remained Indian

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well as "surplus land sold, set aside for town-site purposes, granted to the State * * * or otherwise disposed of." See Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451 (Rosebud Act); Act of Feb. 17, 1910, ch. 40, 36 Stat. 196 *et seq.*, amending Section 8 of the 1908 Act before the Court (Pet. Br. App. A18-A20). Under the Act of July 23, 1892, ch. 234, 27 Stat. 260 *et seq.*, as amended by the Act of Jan. 30, 1897, ch. 109, 29 Stat. 506 *et seq.*, the prohibition already applied to all restricted allotments whether or not within a Reservation, but, at least by clear implication, did not cover unrestricted allotments or alienated parcels even inside a Reservation. See *United States* v. *Sutton*, 215 U.S. at 293. See also, n.12, *supra*. Indeed, that is the general rule today with respect to "non-Indian communities" within Reservations. 18 U.S.C. 1154(c); see *United States* v. *Mazurie*, 419 U.S. 544 (1975). It follows that the provisions in the 1910 statutes quoted above were redundant with respect to allotments (until the restrictions were removed), but important as they affected alienated lands, even if the Reservation boundaries remained unchanged.

Again, the point is illustrated by the Crow Allotment Act of 1920, which, in Section 9 (41 Stat. 754), extended the liquor prohibition to fee tracts within the Reservation (including unrestricted allotments held by Indians, lands alienated to others, and state school sections)—an action which no one has suggested disestablished or changed the boundaries of the Crow Reservation. So, also, a like statute covering the Colville Reservation did not affect the result in *Seymour*. See Act of Aug. 31, 1916, ch. 424, 39 Stat. 678 *et seq.*, noticed by the Court, 368 U.S. at 356 n.12.

for most purposes. The last decision states the situation aptly (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398 * * *.
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> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases*, *supra*. Thus, we conclude, that the lands described in the bill were "Indian lands" * * * [17]

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[17] Usually, the lands "opened" under this type of legislation were not simply made available to all comers under the provisions of the general public land laws; rather, their disposition was governed by special conditions, typically involving classification and appraisal, installment payments, and, if no purchasers appeared after seven years, sale at public auction. A common provision expressly stipulated that "no person shall be permitted to settle upon, occupy, or

It is plain that the continuing tribal interest in the lands opened under these arrangements was not merely a right of reversion in the event the lands were never sold and the Government continued to decline to purchase them itself. There was not a completed sale, subject only to a condition subsequent. Nor was the Government "taking" the land without payment, exposing itself to an obligation, in due course, to make "just compensation" out of Treasury funds if settlers failed to provide the price. Compare *United States* v. *Sioux Nation of Indians, supra.* Indeed, the Congress expressly excluded that possibility. See n.15, *supra.* The transfer was, rather, an incomplete transaction, held in abeyance until payment should be received from homesteaders. For the time being, the Indians' possessory rights were suspended, but that is all. And, at some point, if the scheme failed for lack of purchasers, the Tribe's right to resume occupancy presumably must be conceded—even without the benefit of "restoration orders" under the Indian Reorganization Act of 1934.[18] In the interim, the Indians' title had survived

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enter any of said lands except as prescribed in [the President's] proclamation." *E.g.*, Sections 2-5 of the 1908 Act (35 Stat. 461-463) involved here, Pet. Br. App. A4-A12. And, of course, the proceeds of sale did not go to the Treasury as unrestricted moneys, but were required to be credited to the Tribe, with interest. *E.g.*, Section 6 of the same Act (35 Stat. 463), Pet. Br. App. A12. Obviously, this was a far cry from simply "restoring" the area unconditionally to the "public domain."

We note that the statutes involved in *Ash Sheep* and *Minnesota* v. *Hitchcock* incorporated agreements with the Tribe which purported to "cede" the lands that were to be opened to sale. But the Court looked to the substance of the transaction, not the terminology, and concluded that the "cession" was conditional, in effect suspended until and unless sales to settlers were realized. *A fortiori*, that must be the result where no agreement and no words of cession are present.

[18] Section 3 of the IRA, 25 U.S.C. 463, authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation [heretofore] opened." Since legal title was to reman with the United States and the Tribe had never

and there was no basis for altering the Reservation boundaries.[19]

The early cases, it is true, dealt only with *unsold* "surplus" lands. But, given that these retained their Reservation status—even if partially suspended—it would be incongruous to conclude that new boundaries should be drawn, in a crazy-quilt pattern, to exclude alienated parcels after Congress determined that they, also, should be deemed "Indian country." 18 U.S.C. (Supp. V) 1151(a). At all events, that is what this Court squarely decided in *Seymour* and re-affirmed in *Mattz*.

4. There is a final caveat. In cases where the opened area of a Reservation was entirely—or almost entirely—sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is

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lost beneficial title, the practical effect of restoration orders under this provision was to return *use and occupancy rights* to the Tribe. As the Senate Report accurately recited, Section 3 of the IRA was intended to restore unsold "surplus" tracts "to tribal use." S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Stated differently, restoration orders ended the suspended status of such areas. As we have said, that result must have occurred sooner or later if the surplus lands remained unsold for a very extended period. But the IRA and the restoration orders issued under it serve the useful function of mooting the question whether, in a given case, lapse of time had already effectively ended the "opening" of tribal lands. Plainly, such restoration orders are not evidence that the Reservation status of the affected lands had been irretrievably lost. *See-Rosebud*, 430 U.S. at 604 n.27.

[19] It is worth noting that Interior Department Regulations promulgated in 1912 "contemplated that remaining surplus lands, the proceeds of the disposal of which were for the benefit of the Indians, would be cooperatively administered by the Indian Office and the General Land Office, the Indian Office retaining jurisdiction of the use of the lands before they were sold and the General Land Office administering the final disposition of the lands." See 56 Interior Dec. 330, 339 (1938).

it an impermissible attempt to construe turn of the century legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening up" legislation would have intended to end the Reservation status of the affected area *if and when* their expectations were fully realized, but not otherwise.[20] Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few settlers had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. 430 U.S. at 588 n.3. And, today, more than 90% of the opened area is non-Indian, both in population and land use. Id. at 605. In these circumstances, it was obviously difficult to conclude that Congress would have wished the affected area to retain Reservation status. At some point, the tail can no longer wag the dog.[21]

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[20] Where allotments, normally restricted for 25 years, were provided for in the opened area, it would be reasonable to suppose that the "Indian" character, or "Reservation status," of that area was intended to lapse at the end of the 25-year period—which also coincided in some cases with the time when the liquor prohibition would cease—assuming that, by then, the surplus lands also had been fully disposed of. See *Mattz*, 412 U.S. at 496.

[21] This likewise explains the ultimate redrawing of Reservation boundaries to exclude the opened area of the Red Lake Reservation considered in *Minnesota* v. *Hitchcock*, and the area of the Crow Reservation affected by the 1904 Act involved in *Ash Sheep*. In both cases, almost all the unallotted land in the opened portion of

So saying, we imply no "majority rule" under which the status of opened tribal lands depends upon whether more or less than half the acres, or the population, remain Indian. One of the familiar consequences of the allotment policy is that, as a result of numerous exceptions to the restrictions on alienation, much of the acreage of even the unopened portion of some Reservations is today in non-Indian hands. *E.g., Montana* v. *United States*, 450 U.S. at 548 (Crow Reservation); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 3. So, also, the concentration of a large non-Indian population in a few alienated town sites within a Reservation sometimes left the Indians grossly outnumbered. *E.g., Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Since these disparities do not affect the status of the Crow Reservation, the Quinault Reservation, or the Yakima Reservation, there is no cause to treat like patterns of land ownership or population as inconsistent with Reservation status for once opened areas. It is only when the Indain character of former tribal lands is wholly destroyed that it seems justifiable to sever the area from the Reservation.

B. The 1908 Act

Applying the principles just outlined to the case before the Court yields a clear conclusion against diminishment of the Cheyenne River Reservation. The points are quickly stated.

1. First and foremost, the 1908 Act involved here is typical opening up legislation, of a piece with the statutes considered in *Seymour* and *Mattz*. There was no present

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the Reservation was sold before 1934. See *United States* v. *Holt State Bank*, 270 U.S. 49, 52-53 (1926). In the case of the Crow Reservation, only some 10,000 acres (out of a total of more than 1 million acres) in the area opened by the 1904 Act remained unsold, as attested by the "restoration" Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

cession for an agreed price, but, instead, an arrangement whereby the Government—expressly avoiding any obligation to buy itself—undertook to sell tribal lands to settlers for the account of the Tribe. No language of cession is to be found, nor any other terms "precisely suited" to disestablishment. Indeed, there was no prior agreement with the Tribe.

The basic character of the congressional action is perfectly clear. It cannot be changed into an immediately effective cession merely because the drafters carelessly spoke of the unopened portion of the Reservation as "diminished" in one place (§ 2 (35 Stat. 461); Pet. Br. 19-20), and, in another (§ 9 (35 Stat. 464); Pet. Br. App. A16), to the opened area as "part of the public domain." These were, of course, half-truths. Except for any allotments selected in the territory opened to settlers, the area of Indian occupancy *was* diminished temporarily; and, ultimately, if all went as expected, the Reservation would be permanently reduced in size. Similarly, although the opened area could not accurately be assimilated to the "public domain" because it remained encumbered by tribal equitable ownership and was only made available to settlers on special conditions,[22] those lands were, for the time being, given some of the attributes of "public lands."[23]

At all events, such convenient short-hand references to the two portions of the Reservation cannot overcome the detailed provisions of the statute. Cf. *Mattz*, 412 U.S. at 498. Knowing the true nature of the arrangement, we cannot be misled by a wrong label. In all essential re-

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[22] See n.17, *supra*.

[23] The "surplus lands" were, after all, opened to entry under some of the "public land laws," albeit with significant qualifications. Perhaps the most useful short-hand description of unsold "surplus" lands opened to sale is that given by the Interior Department Solicitor in 1938 (56 Interior Dec. at 338): "qualified public lands and also qualified Indian lands."

spects, the 1908 Act is indistinguishable from the statutes examined in *Seymour* and *Mattz* and the consequences should be the same.[24]

2. Resort to legislative history gives no different answer. To be sure, the Indians were briefly consulted as to their willingness to part with the area to be opened. Since it was anticipated that purchasers would be found for all the lands, the Government representative quite understandably did not advert to the legal status of the area in the event that expectation was disappointed. And it is equally unsurprising that tribal spokesmen did not discuss that eventuality. Interestingly, one tribal leader preferred to have the Government "buy [the surplus lands] outright," fearing that "it [would] take years for all of the land to be disposed of." Pet. Br. App. A153. He was firmly told that a "lump sum" payment was impossible because "Congress will not accept anything of that kind." Pet. Br. App. A158. Nevertheless, the Indians presumably believed that white men wanted the land and would buy it sooner or later, and that, except for allotments, the entire area would be taken. Given that premise, there is nothing in the minutes of the truncated Indian meetings held by Inspector McLaughlin or in his report that casts useful light on our question.

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[24] The Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80 *et seq.*, considered in *Seymour*, is identical to the present statute except that (1) it does not contain a "school section" provision or one prohibiting the introduction of intoxicants, and (2) it provided for sale, rather than reservation of minerals on the opened tracts. As we have already noted, the first difference is irrelevant to our inquiry. The second, on the other hand, cuts in favor of continued Reservation status here.

The Act of June 17, 1892, ch. 120, 27 Stat. 52 *et seq.*, considered in *Mattz*, is much more abbreviated. If anything, it is more susceptible to being construed as a "termination" statute because the opened lands are made available under the land and mineral laws *without condition*. This was more arguably a "restoration to the public domain" than can be found in the 1908 Act now before the Court.

What is relevant, however, is that, at the end of the day, no cession resulted. The Tribe, told it had no real option in light of *Lone Wolf*, mostly listened and never fully acquiesced in the opening arrangment. See, *e.g.*, Pet. Br. App. A124-A125, A127-A129, A141, A145-A146, A152, A161.[25]

Nor do the congressional debates and reports offer more. Again, although the Congress was careful not to commit itself to any payment from the Treasury (except for school sections), the prevailing optimism foreclosed any discussion of the consequences if homesteaders did not come forward in sufficient numbers. In these circumstances, no significance can be attached to a reference to the Reservation in one Committee Report as "diminished" (Pet. Br. App. A28). Indeed, another Report speaks of surplus lands "on the Cheyenne River and Standing Rock Indian reservations" (Pet. Br. App. A21, A36).

Finally, an amending statute of 1910 is invoked (Pet. Br. App. A17-A20). Reinstating the figure recommended two years earlier, that legislation increased (from $1.50 to $2.50 per acre) the price to be paid for the school sections, and, accordingly, made a larger appropriation for that purpose. See S.D. Counties' Br. App. C1-C51. Beyond this, the 1910 Act subjected the entire original Reservation to existing laws prohibiting the introduction of intoxicants into Indian country (Pet. Br. App. A19-A20). For the reasons already given (n.16, *supra*), we cannot construe this action as bearing on the issue of diminshment or disestablishment. At all events, this later statute, enacted *at the request of the Tribe*, can hardly

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[25] In fact, one of the few tribal leaders present asked for more time to consider the matter in full Council and was cavalierly told to communicate the Tribe's views to the Agency Superintendent, who must forward them to reach Washington within two weeks. See Pet. Br. App. A50, A161. Unsurprisingly, no such communication was received before Inspector McLaughlin submitted his report. Pet. Br. App. A50-A51.

affect what is claimed to have been a present cession two years earlier. See S. Rep. 518, 61st Cong., 2d Sess. 3, 5 (1910).

3. The subsequent history, as in most like cases, is confused and rife with inconsistencies. See *Seymour*, 368 U.S. at 356 n.12; *Mattz*, 412 U.S. at 484-485; *DeCoteau*, 420 U.S. at 442-444; *Rosebud*, 30 U.S. at 603-605. For the most part, it is no more reliable here than elsewhere in deciding the diminishment issue. Nevertheless, we may notice two points.

From the first, there were references to the opened area as a continuing part of the Reservation, both in Acts of Congress,[26] congressional reports and debates,[27] and executive documents.[28] So, also, the approved tribal constitution of 1935 gave the Tribe jurisdiction over the whole undiminished Reservation. See Pet. Br. 60.

Nor is the early jurisdictional history as one-sided as petitioners suggest. To be sure, in *United States* v. *La Plant*, 200 F. 92 (D.S.D. 1911), a district court, on questionable reasoning, declined jurisdiction of a homicide

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[26] *E.g.*, the Act of June 23, 1910, ch. 369, 36 Stat. 602, authorizing the sale to a railroad of a tract in the opened area described as "in the Cheyenne River Reservation"; and Section 2 of the Act of Mar. 4, 1921, ch. 174, 41 Stat. 1447, permitting extension of time for payment of installments due by purchasers of land "in the Cheyenne River Reservation."

[27] *E.g.*, H.R. Rep. 1046, 61st Cong., 2d Sess. (1910); S. Rep. 723, 61st Cong., 2d Sess. (1910); H.R. Rep. 315, 62d Cong., 2d Sess. (1912); S. Reps. 209 and 216, 62d Cong., 2d Sess. (1912); 45 Cong. Rec. 5799-5810 (1910).

[28] References to the opened lands as "in" or "within" the Reservation occur in the President's opening Proclamation (38 Interior Dec. 157 (1909)), an Indian Department Order relating to selection of school sections (38 Interior Dec. 455 (1910)), and others extending the time for payment by purchasers (48 Interior Dec. 80 (1921); 49 Interior Dec. 131 (1922)).

by one non-Indian against another in the opened area,[29] and the State occasionally filled the void. But prosecutions by either sovereign, then as now, were rare, and, in fact, many civil and criminal matters continued to be handled by tribal and federal authorities within the opened lands. See *Hoxie Report* 100-108, 108-118.[30] In other respects, the United States remained the civilian administrator of the entire original Reservation, including the unsold lands. *Hoxie Report* 71-81, 87-93.

4. In our view, these facts are of secondary relevance. What is dispositive here, it seems to us, is that the opening up experiment in large measure failed, so that today the disputed area retains an important Indian character. As we have said, even though no immediate disestablishment was accomplished by enactment of the 1908 Act, that result might well have later occurred if settlers had, as expected, acquired all, or almost all, the opened lands—as was the case in *Rosebud*. But no such implied diminishment can be found when, as here, the Tribe's title to most of the opened land survived and has been formally "restored" by Interior Department orders.[31]

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[29] At the time, a special statute (Act of Feb. 2, 1903, ch. 351, 32 Stat. 793) provided—contrary to *United States* v. *McBratney*, 104 U.S. 621 (1882)—that, regardless of the race of the offender and the victim, certain enumerated crimes were within federal jurisdiction if committed on any "Indian Reservation" in South Dakota. Accordingly, the court in *La Plant should* have focused on whether the opened area of the Cheyenne River Reservation had been disestablished. In fact, however, the court based its ruling on a finding—erroneous in light of *Ash Sheep*—that Indian title had been extinguished by the 1908 Act as to unsold tracts. See 200 F. at 94-95.

[30] F. Hoxie, *Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908* (undated manuscript) [hereinafter cited as *Hoxie Report*]. This report was part of the record in *United States* v. *Dupris*, *supra*, and was incorporated as part of the record in the instant case, now transmitted to this Court.

[31] The area opened by the 1908 Act comprises approximately 1.6 million acres. By the time of the opening Proclamation of August

Indeed, unless the question was irrevocably settled in 1908, it is difficult to attribute to anyone—including the Congress of 1908—an intent to treat as no longer part of the Reservation an area which includes the tribal capital, the Indian Agency and the major Indian town, within which some two-thirds of tribal members reside (outnumbering non-Indians there), and where almost half the areage is Indian owned. Common sense rebels against that result.

What is more, compelling such a complex pattern, in a case like this one, defeats more recent congressional policy and unnecessarily creates jurisdictional problems. In 1934, implementing the Indian Reorganization Act, the Secretary of the Interior halted all further sales of "opened lands," including those on the Cheyenne River Reservation. See 54 Interior Dec. 559, 561, 563-564 (1934).[32]

19, 1909, almost 400,000 acres in that area had been allotted to tribal members, and some 133,000 acres were subsequently allotted there. *Hoxie Report* 38, 88. After deducting some 90,000 acres for state school sections, this left about 1 million acres open to homesteaders. But it appears that relatively few entries were perfected, in large part because the extravagant promise of the "boosters," having got the settlers in, could not keep them there. See *Hoxie Report* 66-67. The restoration orders, affecting unsold tracts in the opened portion of the Reservation, cover all but one of the 78 townships that are embraced in whole or in part within the opened area. See 6 Fed. Reg. 3300 (1941); 14 Fed. Reg. 471 (1949); 17 Fed. Reg. 1065 (1951); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1967). Although the actual acreage of the unsold lands affected by the major "restorations" of 1941 and 1951 (6 Fed. Reg. 3300 and 17 Fed. Reg. 1065) is not given, the detailed exclusion of tracts as small as a sixteenth of a section and individual townsite lots suggests that most of the remaining unallotted land was unsold. But, as on many other Reservations, a large number of allotments fell into non-Indian hands and this accounts for a substantial part of the "fee" holdings now existing in the former opened area. Nevertheless, today, almost half the opened area remains in Indian ownership, all of it, with minor exceptions, in trust or restricted status.

[32] On September 19, 1934, the Secretary of the Interior approved the recommendation of the Commissioner of Indian Affairs, joined

Most of the unsold area was "restored" to the Tribe in 1941 (6 Fed. Reg. 3300) and 1951 (17 Fed. Reg. 1065), smaller tracts in other years (14 Fed. Reg. 471 (1949); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1957)). As the South Dakota Counties (Br. 46-47 & n.16) are at pains to point out, these orders expressly declared the restored acreage "part of the existing reservation." [33] Thus, it is common ground that much of the disputed area is today not merely "Indian country," but an integral portion of the Cheyenne River Reservation. In light of the congressional decision

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by the Commissioner of the General Land Office, that all unsold lands within the opened areas of Indian Reservations be temporarily withdrawn from sale with a view to "restoration" under Section 3 of the IRA—specifically including lands covered by the 1908 Act involved here. 54 Interior Dec. at 561-562, 563. This order was later amended to cover three further opened Reservations and to embrace unsold lots in townsites. *Id.* at 563-564. It is to be noted that, at the time, the Department's view was that restoration orders under Section 3 could only reach lands "usually referred to as surplus lands of Indian reservations." *Id.* at 560. Four years later, to be sure, it was held that lands "cut off" from Reservations, but as to which Indian beneficial title had not been extinguished, were equally subject to restoration under Section 3. 56 Interior Dec. 330, 333 (1938). But that does not impugn the opinion given in 1934 that the Cheyenne River Reservation was not diminished by the 1908 Act. At all events, it is clear that, at all times, the Department viewed "restored" lands as enjoying "Reservation status" thereafter. See 56 Interior Dec. at 333.

[33] Petitioners and those who support them argue that, because restoration orders invoked both Section 3 and Section 7 of the IRA (25 U.S.C. 463, 467), they should be construed as "adding" to the Reservation lands which had previously lost that status. But there is no stronger reason to take that view here than in respect of a similarly worded "restoration," by Act of Congress, in the case of the Colville Reservation. See *Seymour*, 368 U.S. at 356. As previously noted (n.18, *supra*), such orders are ambiguous on the interim status of surplus lands. But no one disputes the validity or effectiveness of those restoration orders as confirming or granting Reservation status to the "restored" lands for the future. See n.32, *supra*.

in 1948 to give like status to allotted and alienated tracts within a Reservation, it is hardly consistent to draw Reservation boundaries in the opened area in "checkerboard" fashion so as to include only restored lands.

In our submission, every consideration argues for the obvious alternative: the Cheyenne River Reservation was not immediately diminished in 1908, and, notwithstanding the expectations of all concerned, the opened area survived as part of the Reservation. That solution is both practical and faithful to the intent of Congress. And it follows the Court's rule that only the clearest directive will destroy the protective shield of Indian Reservation status.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1983

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-6281

ROBERT HAGEN, PETITIONER

v

STATE OF UTAH

On Writ of Certiorari to the Supreme Court of Utah

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. Moreover, because of the United States' special relationship with the Indian Tribes, we have a strong interest in the development of sound principles for determining when a reservation has been diminished or extinguished.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, are reprinted in an appendix to this brief.

STATEMENT

1. On October 3, 1861, President Lincoln established an Indian Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne.[1] Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5,1864, ch. 77, § 2, 13 Stat. 63.

Before the end of the nineteenth century, however, the Uintah Indian Reservation—like many others—became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon reservation lands." *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-432 (1975). Those forces led to the passage in 1887 of the General Allotment Act, which granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

The first significant step in the move toward allotment of the Uintah Indian Reservation came in 1894, when Congress directed the President to appoint a commission to negotiate with the Indians on the Reservation for the acceptable of allotments and "the relinquishment to the United States of the interest of said Indians in all [unallotted lands]." Act of Aug. 15, 1894, ch. 290, § 22,

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[1] Another river now referred to as the Uinta is a tributary of the Duchesne that flows near the eastern boundary of the original Reservation before entering the Duchesne near the southeastern corner of the original Reservation.

28 Stat. 337.[2] Because the matter was not resolved promptly,[3] Congress in 1898 again directed the Secretary to appoint a commission to negotiate an agreement for allotment of Uintah Indian Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Indians resisted, Senator Rawlins of Utah introduced a series of bills that would have opened the Reservation unilaterally. S. 4867, 55th Cong., 3d Sess. (1898); S. 93, 56th Cong., 1st Sess. (1899); S. 145, 57th Cong., 1st Sess. (1902) (*reproduced in* S. Doc. No. 212, 57th Cong., 1st Sess. 3-4 (1902)); see S. Doc. No. 212, *supra*, at 4-6 (discussing resistance of Indians). Those bills, however, were not enacted.

Instead, in 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation.[4] The allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264 (1902 Act). The 1902 Act also provided that when the October 1, 1903, deadline for allotments passed,

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[2] In 1888, Congress had restored to the public domain a 7,040-acre triangle on the eastern edge of the Uintah Reservation, commonly referred to as the "Gilsonite Strip," because of the deposits of gilsonite found on that tract. Act of May 24, 1888, ch. 310, 25 Stat. 157-158. The status of the Gilsonite Strip is not at issue in this case.

[3] Negotiations with the Uintah Reservation Indians were delayed because of difficulties encountered in negotiating with the Indians on the neighboring Uncompahgre Reservation. See S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897).

[4] The Ute Indian Tribe participating as an amicus in this case includes the descendants of those Indians; it consists of the Uintah, Uncompahgre, and White River Bands of Indians. See Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation 1 (1937).

"all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the 1902 Act provided that the net proceeds of the sale of lands restored to the public domain, "under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[5]

The allotments did not, however, proceed as provided for by the 1902 Act. Accordingly, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. That Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Indians continued to oppose the plan,[6] Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (1905 Act), Congress again deferred the time for opening the unallotted lands to public entry, this time to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. Section 1, 33 Stat. 1069. The March 1905 Act then specified "the

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[5] A month later, Congress supplemented the 1902 Act with a provision requiring the Secretary.

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).

[6] Only 82 of the 280 adult male Indians eligible to vote approved the transaction. See H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903).

manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for such tracts as might be set aside as a national forest service, and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[7] All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations * * * prescribed by the Secretary of the Interior." 33 Stat. 1070. The proceeds of the sale of unallotted lands were to be applied, in accordance with the 1902 Act, for the benefit of the Indians. 1905 Act, § 1, 33 Stat. 1070.

The government failed to obtain the consent of the Indians to the arrangement. Nevertheless, President Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Indian] Reservation * * * will on and after the 28th day of August, 1905, * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.[8]

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[7] The 1905 Act also authorized the President, before opening the reservation to entry, to set aside additional lands for the Uintah Forest Reserve that had been established adjacent to the Reservation in 1897, as well as for reservoir and other water-supply purposes. 33 Stat. 1070.

[8] On the same day, President Roosevelt, acting pursuant to the 1905 Act, see note 7, *supra*, set aside about 1,010,000 acres within the Reservation as an addition to the Uintah Forest Reserve. 34 Stat. 3116. In 1931, Congress appropriated $1,217,221.25 to compensate the Indians for 973,777 acres of those lands, at the rate of $1.25 per acre. Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092-1093. Congress compensated the Indians for the remainder of the forest reserve lands in 1956 by restoring to the Indians the title to the mineral resources on those remaining lands. Act of July 14, 1956, ch. 603, 70 Stat. 546. Pursuant to the 1905 Act, see note 7, *supra*, the President also withdrew certain lands for reservoir purposes, by proclamations issued on August 3 and August 14, 1905. 34

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the town of Myton, which lies within the original exterior boundaries of the Uintah Indian Reservation, in an area that was opened to non-Indian settlement under the 1905 Act. Petitioner initially pleaded guilty. Before sentencing, however, petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[9] The trial court denied that motion, finding that petitioner is not an Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

Stat. 3141-3143, 3143-3144. As to those lands, Congress in 1910 appropriated funds to pay the Indians $1.25 per acre, in return for which "[a]ll right, title, and interest of the Indians in the said lands [were t]hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. The last major congressional action with respect to the Reservation came in 1948, when Congress "extended" the "exterior boundary of the Uintah and Ouray Reservation" to include a tract of approximately 510,000 acres, commonly referred to as the "Hill Creek Extension." Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. The status of the forest reserve land, the reservoir land, and the Hill Creek Extension is not at issue in this case.

[9] The term "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." See *Oklahoma Tax Commission* v. *Sac and Fox Nation*, No. 92-259 (May 17, 1993), slip op. 8-11. As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the States—*e.g.*, in a special jurisdictional statute, see *Negonsott* v. *Samuels*, 113 S. Ct. 1119 (1993), or in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590, see *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over the Indian country at issue here pursuant to either a special jurisdictional statute or Public Law 280.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court of appeals noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994 (1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision the same day in *State* v. *Perank*, No. 860243 (July 17, 1992), *reprinted in* Resp. App. 4a-75a.[10] In *Perank*, the Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

SUMMARY OF ARGUMENT

A. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), establishes a clear-statement rule for resolution of claims that Congress has diminished the boundaries of an Indian reservation. Under that rule, an Act of Congress generally does not diminish a reservation unless the Act includes both "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" and "an unconditional

[10] "Resp. App." refers to the appendix to the brief of respondent in support of the petition.

commitment from Congress to compensate the Indian tribe." *Id.* at 470. A limited exception permits a finding of diminishment "[w]hen events surrounding the passage of [the statute] * * * unequivocally reveal a widely held, contemporaneous understanding that [the statute would diminish the reservation]," *id.* at 471; the statute involved in the instance cited in *Solem* for that proposition (unlike the statute at issue here) contained clear language of cession.

B. The Acts at issue here do not satisfy either requirement of the clear-statement rule articulated in *Solem*. First, they do not require unconditional compensation; rather, the compensation was limited to a share of any proceeds the United States would obtain if it was successful in disposing of the opened lands. Second, the statutes do not make any explicit reference to cession, or in any other way state that the Indians were surrendering all of their interests in the opened lands.

The only feature of the statutes that points toward a finding of diminishment is the statement in the 1902 Act that the opened lands were to be "restored to the public domain." Section 1, 32 Stat. 263. But, as the Court in *Solem* explained, such a reference is not sufficient to justify a finding of diminishment, because it could simply mean that the lands in question were returned to the public domain in the sense that they became available for non-Indian settlement; the languaeg does not expressly indictate that the lands were to be removed from the Reservation. See *Solem*, 465 U.S. at 475 n.17. Moreover, even if such a reference might in some circumstances be adequate to justify a finding of diminishment, it would not suffice here because it was included only in the 1902 Act, not the 1905 Act under which the unallotted lands on the Uintah Indian Reservation actually were opened to settlement.

C. This case does not involve the type of widely held understanding that would justify finding a reservation

diminished even though the statute does not satisfy both aspects of the clear-statement rule articulated in *Solem*. Because only Congress has the power to alter the boundaries of a reservation, the only understanding that should suffice is an understanding shared by Congress and the affected Indians. In this case, there is no basis for supposing that the Indians understood the 1905 Act would alter the boundaries of the Reservation, nor is there any explicit statement in the legislative history that the 1905 Act would have that effect. Accordingly, there is no basis for further investigation of secondary materials. In any event, because those materials are rife with inconsistency and contradiction, they cannot "unequivocally" reveal a widely held understanding sufficient to diminish the Reservation. *Solem*, 465 U.S. at 471.

ARGUMENT

The UINTAH INDIAN RESERVATION WAS NOT DIMINISHED BY THE 1905 ACT OR ITS 1902 PREDECESSOR

A. A Reservation Is Diminished Only When Congress Enacts A Statute Using Unambiguous Language Of Cession, And Either Congress Grants Unconditional Compensation To The Indians, Or There Is An Unequivocal And Widely Held Contemporaneous Understanding That The Reservation Is Diminished

Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that Act (and others like it) no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus

land acts diminished reservation,[11] and other surplus land Acts did not.[12]" *Solem v. Bartlett*, 465 U.S. 463, 468-469 (1984) (citations omitted).[13] As explained in *Solem*, the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks,

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[11] See, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

[12] See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

[13] As the Court noted in *Solem*, the precise location of reservation boundaries "seemed unimportant" at the time the surplus land Acts were passed. 465 U.S. at 468. Until 1913, Indian title, not the reservation boundary, generally determined which sovereign had jurisdiction over a particular tract of land. See, *e.g.*, *Bates* v. *Clark*, 95 U.S. 204, 208-209 (1877); *Ex parte Crow Dog*, 109 U.S. 556, 560-462 (1883). In 1913, however, this Court initiated an expansion of the judicial definition of Indian country to include lands that had been reserved and set apart as an Indian reservation by Executive Order, even though they were not owned by Indians. *Donnelly* v. *United States*, 228 U.S. 243, 268-269 (1913). The expansion culminated in 1948, when Congress enacted a statutory definition of Indian country that includes lands held in fee by non-Indians within reservation boundaries. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. 1151(a)); see generally *Solem*, 465 U.S. at 468 (summarizing the expansion of the concept of Indian country).

ellipses, and citation omitted). The most probative evidence bearing on that question is the statutory language used to open the reservation. Language that "[e]xplicit[ly] refer[s] to cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471.[14]

Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. As explained in *Solem*, "[w]hen events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress shared that understanding and intended to diminish the reservation. *Solem*, 465 U.S. at 471. That portion of the *Solem* opinion was explaining the holding in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).[15] In that case, the Court concluded that a reservation had been diminished by a statute that, although it contained language of cession, did not offer payment to the Indians of a sum certain as compensation; the *Rosebud* Court relied heavily on the fact that the statute

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[14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-449 (1975). In the presence of neither factor, the Court found reservations not to have been diminished in *Solem*, 465 U.S. at 472-476; *Mattz* v. *Arnett*, 412 U.S. 481, 494-505 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962).

[15] See *Solem*, 465 U.S. at 471 (stating that "our opinion in *Rosebud Sioux Tribe* demonstrates" the accuracy of the discussion at hand).

was designed to implement an agreement with the Indians that used language of cession and indisputably provided for diminishment of the reservation. See *id.* at 591-595. The *Solem* Court made clear, however, that the holding in *Rosebud* was not to be given broad application, emphasizing that "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act,"—limits that require "substantial and compelling evidence of a congressional intention" to diminish in order to justify a ruling that a reservation has been diminished. 465 U.S. at 472. That requirement is consistent with the general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota* v. *Bourland*, No. 91-2051 (June 14, 1993), slip op. 7 (quoting *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. St. 683, 693 (1992)).

B. Neither The 1905 Act Nor Its 1902 Predecessor Contained A Provision For Unconditional Compensation Of The Indians Or Language Of Cession

1. *The 1905 And The 1902 Act Did Not Provide For Payment Of A Sum Certain To The Indians*

As the Court has explained, an important indicator of congressional intent to alter reservation boundaries is the contemporaneous appropriation of funds to provide unconditional compensation—payment of a "sum certain [16] —to the Indians for the lands being opened to settlement. See *Solem*, 465 U.S. at 470-471. Neither the 1905 Act nor the predecessor 1902 Act providing for the opening of unallotted lands on the Uintah Indian Reservation furnished unconditional compensation to the Tribe. As

[16] See *Solem*, 465 U.S. at 469 n.10; *Rosebud*, 430 U.S. at 598 n.20; *DeCoteau*, 420 U.S. at 446, 448.

mentioned above, the sole compensation offered the Indians was to come from whatever proceeds the government might obtain from the disposition of the unallotted lands. 1905 Act, § 1, 33 Stat. 1070 (incorporating by reference the provisions for application of the proceeds in Section 1 of the 1902 Act, 32 Stat. 264).[17] Hence, the government was under no obligation to compensate the Indians at all unless it was successful in disposing of the unallotted lands.[18]

The discussion of the payment mechanism in this Court's earlier decisions makes it clear that the arrangement for the Uintah Indian Reservation was not the type of unconditional compensation or sum-certain payment that suggests an intention on the part of the Congress to diminish a reservation.[19] The method of compensation

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[17] That conditional payment obligation differs from the compensation later made by the United States for the forest reserve and reservoir lands discussed in note 8, *supra*. See also 32 Stat. 264 (provision of the 1902 Act providing that $70,064.48 was "to be paid to the Uintah and White River Utes" to cover various claims of the Indians against the United States, if those Indians consented to the allotment described in the 1902 Act).

[18] The legislative history suggests that Congress clearly understood the difference between the two modes of payment, and understood that the Indians had a strong preference for unconditional compensation. The Commissioner of Indian Affairs testified at a hearing before the Senate Committee on Indian Affairs:

> It will make a great difference in negotiating with [the Indians on the Uintah Indian Reservation] whether you propose to pay a cash amount or pay them as the land is sold. The system of paying the Indians for land as it is being sold has not proved the success it was hoped it would be. The Indians are afraid of it. But, generally speaking, the Indians will under certain conditions consent to sell their land if they are paid a cash sum.

S. Doc. No. 212, 57th Cong., 1st Sess. 5 (1902).

[19] See *Solem*, 465 U.S. at 469 n.10 (describing statute at issue in *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962), under which "the Colville Tribe received whatever proceeds these sales

closely resembles the arrangements under the statutes that were found not to have effected a diminishment in *Solem*, 465 U.S. at 473; *Mattz* v. *Arnett*, 412 U.S. 481, 495 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962). See *DeCoteau* v. *District County Court*, 420 U.S. 425, 447-449 (1975) (discussing that aspect of *Mattz* and *Seymour*).[20] Accordingly, the lack of unconditional compensation suggests that neither the 1905 Act nor its 1902 predecessor altered the boundaries of the Uintah Indian Reservation.[21]

2. *Neither The 1905 Act Nor Its 1902 Predecessor Contained Language Of Cession*

a. *The Act of March 3, 1905.*—Analysis of the relevant statutory language begins with the 1905 Act, the

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generated, rather than a sum certain"); *ibid.* (distinguishing between "sum-certain payment" and "a provision guaranteeing the Tribe only the proceeds from the sale of the opened lands"); *DeCoteau*, 420 U.S. at 448 (describing "contrast" between agreement providing for "a sum certain" and agreement that "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers"); *ibid.* (describing contrast between statute that "provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits" and "a straightforward agreement ceding lands to the Government for a sum certain").

[20] A statute involving a similar conditional compensation arrangement was found adequate to diminish a reservation in *Rosebud*. But the statute at issue in *Rosebud* contained explicit language of cession and, as *Solem* explains, further rested on the existence of a "widely held, contemporaneous understanding" sufficient to justify diminishment even where the statute itself did not satisfy the normal requirements for a finding of congressional intent to diminish. 465 U.S. at 471-472. We discuss *Rosebud* at length in Point C, *infra*.

[21] Cf. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 164-166 (1920) (Indians retain equitable interest in lands ceded to United States where United States undertook to sell lands for benefit of the Indians).

statute under which President Roosevelt opened a portion of the Reservation to non-Indian settlement. It was in the 1905 Act that Congress specified "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. 1069. In particular, the 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened lands. *Solem*, 465 U.S. at 470. Rather, it closely resembles the language of the statutes at issue in *Solem*, *Seymour*, and *Mattz*.[22] As a unanimous Court explained in each of those cases, such statutes did not terminate the reservation, but merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356 (quoted in *Mattz*, 412 U.S. at 497, and in *Solem*, 465 U.S. at 473).

The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute

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[22] See Act of June 17, 1892, ch. 120, 27 Stat. 52 (Act at issue in *Mattz*, providing that excess lands were "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands"); Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 81 (Act at issue in *Seymour*, providing that excess lands "shall be open to settlement and entry under the provisions of the homestead laws"); Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461 (Act at issue in *Solem*, providing for the disposition of unallotted lands under the "general provisions of the homestead and town-site laws of the United States").

provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted," Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. Accordingly, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries of the Uintah Indian Reservation.

b. *The Act of May 27, 1902.*—The 1902 Act likewise does not contain language demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation that were opened to non-Indian settlement. Like the 1905 Act, the 1902 Act does not refer to any cession, sale, extinguishment, or conveyance of tribal lands.

The 1902 Act did state that unallotted lands eventually would "be restored to the public domain." Section 1, 32 Stat. 263. As the Court explained in *Solem*, a statement that lands have been restored to the public domain can point in the direction of diminishment, on the understanding that lands set aside in a reservation are, in some sense, removed from the public domain. Indeed, the 1902 Act's reference to "restor[ation] to the public domain" was the principal basis for the decision of the Utah Supreme Court in *Perank*, Resp. App. 20a-28a, on which that court relied in this case. In our view, however, the Utah Supreme Court gave insufficient deference to this Court's decision in *Solem*, the most recent occasion on which this Court considered the effect of a statute referring to a

restoration of reservation lands to the public domain.[23] In *Solem*, the Court characterized such a reference as "hardly dispositive," noting that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. at 475 & n.17;[24] see also *Newhall*

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[23] The Utah Supreme Court in *Perank* also relied on passages in this Court's opinions in *Seymour* and *Rosebud*. Resp. App. 20a-21a. Neither passage was related directly to the issues before the Court in those cases. In any event, even if they are taken at face value, neither reference would shed much light on the statute at issue here. First, the Court in *Seymour* referred in passing to a statute not at issue in the case, which had vacated and restored to the public domain" a portion of the reservation at issue. 368 U.S. at 354 (quoting Act of July 1, 1892, ch. 140, § 1, 27 Stat. 63). The Court implicitly assumed that the 1892 Act had diminished the boundaries of the reservation. That comment does not shed much light on the meaning of the 1905 Act, which does not use the term "vacated," a term that expresses a concept of extinguishment completely absent from the language at issue here.

Similarly, the *Rosebud* Court accepted the parties' understanding that the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 896, terminated a portion of the Great Sioux Reservation by providing that it was "restored to the public domain." 430 U.S. at 589 & n.5. As the Court noted, however, that termination was accomplished with the agreement of three-fourths of the adult male Indians on the Reservation, as required by the treaty between the United States and the Sioux Nation. See *ibid.* If diminishment were found here, it would have occurred without the consent of the Indians. Moreover, the overall thrust of the 1889 Act concerning the Great Sioux Reservation, as set forth in its title, was to divide the Reservation "into separate reservations and to secure the relinquishment of the Indian title to the remainder," 25 Stat. 888 (see *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987)), and the land restored to the public domain was that lying "outside of the separate reservations," § 21, 25 Stat. 896. The substitution of six smaller reservations for the single Great Sioux Reservation, and the assignment of individual Sioux members to one of the six reservations (see §§ 1-6, 16), was the functional equivalent of the cession of the remainder.

[24] Significantly, the "public domain" argument rejected by the Court in *Solem* was advanced not only by the petitioner in that case, but also by the Counties of Duchesne and Uintah, Utah, which

v. *Sanger*, 92 U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws.").[25]

Moreover, even if a reference to the "public domain" might in some circumstances be sufficient to justify a finding of diminishment, Congress's omission of that phrase from the 1905 Act makes it particularly inappropriate to place significant weight on the reference in this case. As discussed above, the 1902 Act—in which the only reference to the "public domain" appears—conditioned implementation on the consent of the Indians. Section 1, 32 Stat. 263-264. Despite several extensions, that consent was not forthcoming. Notwithstanding the absence of consent, Congress finally provided in the 1905 Act for the allotment and subsequent opening of surplus lands to non-Indian settlement. Significantly, however, the 1905 Act, under which the Reservation was opened, did not carry forward the 1902 Act's reference to the "public domain"; instead, the 1905 Act itself specified "the manner of opening [unallotted] lands for settlement and entry," substituting a more detailed statement that the lands would be "disposed of under the general provisions of the homestead and town-site laws of the United States." Compare 1902 Act, § 1, 32 Stat. 263, with 1905 Act, § 1, 33 Stat. 1969.[26] As in earlier cases in which Con-

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appeared as amici, presumably because of the reference to the public domain in the 1902 Act concerning the Uintah Reservation. See 465 U.S. at 475 n.16.

[25] Cf. *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 206 (1987); *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 548-549 n.15 (1987). In evaluating the significance of a reference to lands being in the "public domain," it is important to recall that at the time the statute containing that reference was enacted, the question whether the opened lands continued to be a portion of the reservation would have had little practical significance; it would not, for example, have affected criminal jurisdiction. See note 13, *supra*.

[26] The differences between the two statutes are not limited to the deletion of the reference to the "public domain." Under the 1902

gress failed to enact bills that more clearly suggested an intent to diminish or disestablish a reservation, Congress's abandonment of the public domain language suggests that any effort "to terminate the reservation * * * failed completely." *Mattz*, 412 U.S. at 504.[27]

At bottom the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly in-

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Act, Congress provided that "*all the unallotted lands* within said reservation *shall be restored to the public domain.*" 32 Stat. 263 (emphasis supplied). The 1905 Act, by contrast, provided more generally that the "unallotted lands [except for mineral lands and lands for a forest reserve] shall be disposed of [under the homestead laws] and shall be opened to settlement and entry by proclamation of the President," 33 Stat. 1069, and also authorized the President to set aside lands "necessary to conserve and protect the water supply for the Indians or for general agricultural development," 33 Stat. 1070.

[27] The proposition that Congress retreated in the face of continued opposition on the part of the Ute Indians on the Uintah Indian Reservation is supported by Congress's continued efforts to gain that consent over a period of several years. See S. Doc. No. 212, 57th Cong., 1st Sess. 4 (1902) (statement of Commissioner of Indian Affairs at congressional hearing of his "understand]ing] that there is a treaty arrangement with those Indians which will make it necessary for you to treat with them before it can be thrown open to settlement"); see *id.* at 5 (discussing failure of previous negotiations). Those persistent negotiating efforts contrast favorably with Congress's treatment of the neighboring Uncompahgre Indians, with respect to whom Congress—in the same statute that appointed the first commission to seek consent from the Ute Indians—authoried unilateral and immediate allotment. See Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337-338. As a contemporary House Report explained, the difference in treatment rested on Congress's view that the Uncompahgres had only "the privilege of temporary occupancy," while the Uintah Reservation Indians were "the owners of the lands within the reservation, because * * * it was provided that the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" H.R. Rep. No. 660, 53d Cong., 2d Sess. 1, 2-3 (1894) (quoting Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63).

corporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act was predicated, and the ambiguity of the phrase in the first place, the use of the phrase "public domain" in the 1902 Act fails to carry the State's burden of showing "that Congress clearly evince[d] an intent to change [the] boundaries" of the Reservation. *Solem*, 465 U.S. at 470 (internal quotation marks, ellipses, and citation omitted).[28]

C. The 1905 Act And The 1902 Act Do Not Reflect An Unequivocal And Widely Held Contemporaneous Understanding That They Would Diminish The Uintah Indian Reservation

Relying on the decision in *Rosebud*, the Court stated in Solem that in some cases a statute will be held to diminish or extinguish an Indian reservation even if it does not bear all of the usual marks of such a statute—express language of cession and unconditional compensation for the Indians. In the words of the *Solem* Court, that result is appropriate

> [w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to

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[28] An additional feature of the statutes that suggests they were not intended to alter the boundaries of the reservation is the absence of a specific statutory description of the land that was, in respondent's view, removed from the Reservation. In *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status; the finding of diminishment in those cases therefore comported with the requirement that Congress itself must "clearly evince an 'intent . . . to change . . . boundaries.'" *Solem*, 465 U.S. at 470 (quoting *Rosebud*, 430 U.S. at 615). By contrast, in this case Congress did not describe the areas of the Uintah Indian Reservation that were to be opened to non-Indian settlement, but instead left it to the Executive Branch to identify such lands in the future.

> Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.

465 U.S. at 471.

The circumstances of *Rosebud* that were held sufficient to justify diminishment illustrate the narrowness of that exception to the general rule. *Rosebud* involved an unequivocal and universally shared understanding among the participants to the transaction that the statute in question (the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254) would diminish the boundaries of the Rosebud Sioux Reservation. In particular, it is clear that the Indians had agreed to a diminishment of the Reservation; in 1901, three-fourths of the adult male Indians on the Rosebud Sioux Reservation had executed an agreement (negotiated by Inspector James McLaughlin)[29] under which they would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" the land in question, in return for an unconditional payment of just over $1,000,000. See *Rosebud*, 430 U.S. at 590-591 & n.8.[30] Because Congress was unwilling to agree to outright payment for the lands, Inspector McLaughlin returned to that Reservation to renegotiate the agreement. See id. at 591-592. Although he failed to secure the consent of three-fourths of the adult male Indians, he did secure the consent of a simple majority to a 1903 agree-

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[29] Interestingly, Inspector McLaughin also conducted the unsuccessful negotiations with the Sioux Indians over the land at issue in *Solem*, see 465 U.S. at 476-477, and with the Ute Indians over the land at issue in this case, see H.R. Doc. No. 33, 58th Cong., 1st Sess. 3-7 (1923) (report by Inspector McLaughlin of unsuccessful negotiations).

[30] The applicable treaty with the Sioux Indian Nation provided that no treaty for cession of any part of its reservation would be valid without the consent of three-fourths of the adult male Indians on that reservation. See *Rosebud*, 430 U.S. at 589.

ment that—using the same language of cession as the 1901 agreement—made payment contingent upon successful sale of the land, with the compensation per acre raised from $2.50 to $2.75. See *id.* at 592-594. Congress promptly enacted a statute that set forth the 1901 agreement in its entirety, and then "accepted, ratified, and confirmed [that Agreement] as * * * amended and modified" to delete the obligation of unconditional compensation. Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254-256; see *Rosebud*, 430 U.S. at 594-597.

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used unequivocal language of cession, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). Inspector McLaughlin advised the Indians in unambiguous language that both the 1901 and the 1903 Agreements, if enacted by Congress, would alter the boundaries of the Reservation. See *Rosebud*, 430 U.S. at 591-593. The legislative history reviewed by the Court contained "no indication that Congress intended to change anything [from the 1901 Agreement] other than the form of, and responsibility for, payment," *id.* at 594-595, and the House Report in fact flatly stated that the bill would "ratify and amend an agreement * * * providing for the cession to the United States of the unallotted portion of [the Indians'] lands," see *id.* at 595 (quoting H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904)).

Application of the *Rosebud* analysis to this case shows that whatever the desires of individual Members of Congress, there is no evidence—let alone unequivocal evidence—of a widely held contemporaneous understanding that the opened lands would be removed from the Uintah Indian Reservation. First, there is no document in this case that establishes the "unmistakable baseline purpose

of disestablishment" that was so important to the Court in *Rosebud*, 430 U.S. at 592; none of the relevant documents—the 1905 Act, the previous Acts dealing with the Reservation, or any agreement with the Indians—uses the indisputable language of cession that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the requirement in *Solem* that the "understanding" be "widely held" requires proof that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the only obvious manifestation of such an understanding on the part of the Indians is an agreement of cession, like the one approved in *Rosebud*. Because the Indians in this case steadfastly refused to consent to any alteration of the Reservation boundaries, there is no such agreement in this case.[31] Accord-

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[31] Indeed, as Inspector McLaughlin explained, the Indians on the Uintah Indian Reservation firmly believed "that their reservation could not be opened to settlement without their consent," and that "they were thus advised by officials of the Department [of the Interior] during their visit to Washington." H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903). The view of the Indians was not entirely unreasonable, considering the date of the negotiations in question—May 1903, only four months after this Court's January 1903 decision in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 566-568, first upheld the power of Congress to diminish a reservation unilaterally.

Given the Indians' view on that question, the Utah Supreme Court erred in relying (Resp. App. 37a) on Inspector McLaughlin's advice to the Indians that "there will be no outside boundary line to this reservation." Minutes of Council Meetings Between Inspector McLaughlin and the Ute Indians 42 (May 18-23, 1903), JX 162. "JX" refers to the joint exhibits of the parties in *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072 (D. Utah 1981); the parties have stipulated that the record in this case includes the record in the *Ute Indian* case, see Resp. App. 164a-165a.) In any event, the Indians' response to Inspector McLaughlin's advice was to reject the proposal by an overwhelming margin, see note 6, *supra*. Because the allotment program under the 1902 Act was conditioned on the Indians' consent, it failed and was replaced by the program set forth in the 1905 Act, at issue here. There is no suggestion that any representative of the government advised the Indians that the 1905 Act would alter the boundaries of the Reservation.

ingly, it would be inappropriate to rely on "understandings" to conclude that the Reservation was diminished.

The Utah Supreme Court's contrary conclusion rested to a considerable degree on its understanding of a variety of materials regarding the contemporaneous and subsequent understanding of the 1902 and 1905 Acts. Resp. App. 44a-61a. For two reasons, we do not believe that those materials support the decision of the court below. First, although the Court's decision in this area frequently have mentioned such materials, we believe they have at best only limited relevance. See *Solem*, 465 U.S. at 471 (noting that the Court has considered such materials relevant "[t]o a lesser extent" than the statutory text and other sources discussed above).[32] The suggestion of the *Solem* Court that a widely held, contemporaneous understanding in some cases could be sufficient to justify a finding of diminishment was not a license for the lower courts to conduct a wide-ranging investigation into the views that individual legislators and administrative officials took of legislation. Because only Congress and the Indian Tribes have the power to alter the limits of a Tribe's sovereignty, it is not appropriate to rest decisions regarding those limits on the views of third parties who could not themselves alter those limits.

Second, we do not believe that the historical record supports the Utah Supreme Court's view that both Congress and the Executive Branch understood the 1902 and 1905 Acts to alter the boundaries of the Uintah Indian Reservation. Rather, the historical record here, as in *Solem*, is "so rife with contradictions and inconsistencies

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[32] Moreover, it is not clear that such secondary materials have affected any of the Court's recent holdings in the area. As we explained in note 14, *supra*, all of the Court's recent decisions other than *Rosebud* can be explained by the bright-line rule articulated in *Solem*; and, as discussed above, *Rosebud* itself appears to rest primarily on the terms of congressional enactments and tribal agreements, rather than on the understanding other parties had of those documents.

as to be of no help to either side." 465 U.S. at 478. Most of the materials on which the Utah Supreme Court relied are ambiguous, indicating only that the land in question was to be restored to the "public domain."[33] As discussed above, such references, even in the opening statute itself, do not directly address the question at issue in this case.

To be sure, a few federal statutes enacted shortly after the 1905 Act referred to the Reservation as having been diminished by the 1902 and 1905 Acts.[34] But a number of other statutes apparently rested on the contrary assumption that the Reservation was not diminished by the 1902 and 1905 Acts.[35] Still other statutes referred to the "former" Reservation, a reference that cannot be correct, because all agree that at least the allotted parcels continued to constitute a reservation.[36] Finally, on some

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[33] See, *e.g.*, Resp. App. 45a-46a (President Roosevelt's Proclamations), 51a-52a (subsequent statements of officials in the Department of the Interior), 54a-55a (1971 order of the Department of the Interior, 57a-60a (subsequent judicial decisions).

[34] Act of Jan. 27, 1906, ch. 7, 34 Stat. 9 (referring to "lands which were heretofore a part of the Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 (referring to "lands within the ceded Uintah Indian Reservation"); Act of July 20, 1912, ch. 244, § 1, 37 Stat. 196 (referring to "land which was formerly a part of the Uintah Indian Reservation"). As the Court in *Solem* explained in a similar context, those references may well have been referring to land as having left the common lands of the Reservation, rather than having left the Reservation entirely. 465 U.S. at 475 n.17.

[35] Act of Aug. 1, 1914, ch. 222, § 21, 38 Stat. 604 (referring to "the bridge at Myton, on the Uintah Indian Reservation"); Act of Mar. 4, 1929, ch. 705, § 1, 45 Stat. 1584 (referring to "the State Experimental Farm * * * within the Uintah and Ouray Indian Reservation"); Act of Apr. 22, 1932, ch. 125, § 1, 47 Stat. 111 (same). Similarly, two statutes referred to an extension of the "exterior boundary" of the Reservation, a reference that assumes the Reservation remained a cohesive whole including the opened lands. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72; Act of Aug. 9, 1955, ch. 263, 69 Stat. 544. See generally *Ute Indian Tribe* v.

occasions contradictory references were included in the same Act.[37] As in *Solem*, the ready availability of "ex-

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Utah, 521 F. Supp. 1072, 1133-1134 (D. Utah 1981) (cataloguing legislative materials that assume the opened lands remain in the reservation), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

An extensive number of statutes referred to the Reservation as continuing in existence. Act of Mar. 3, 1921, ch. 119, § 21, 41 Stat. 1245 (obligation to construct bridge "free from all expense to the * * * Indians of the Uintah and Ouray Reservation"); Act of Mar. 4, 1931, ch. 522, 46 Stat. 1567 (appropriation for "[i]rrigation system, Uintah Reservation"); Act of Feb. 2, 1932, ch. 12, 47 Stat. 22 (same); Act of June 19, 1934, ch. 648, § 1, 48 Stat. 1033 (same); Act of Aug. 9, 1937, ch. 570, § 1, 50 Stat. 573 (referring to funds "apportioned to the Indians of the Uintah and Ouray Reservation"); Act of Mar. 16, 1950, ch. 59, 64 Stat. 19 (referring to the "Ute Indian Tribe of the Uintah and Ouray Reservation"); Act of Aug. 21, 1951, ch. 338, §§ 1-2, 65 Stat. 194 (same); Act of Aug. 27, 1954, ch. 1009, §§ 1-2, 68 Stat. 868 (same); Act of July 14, 1956, ch. 603, §§ 1-5, 70 Stat. 546-547 (same).

[36] Act of June 21, 1906, ch. 3504, 34 Stat. 375 ("former Uintah Reservation"); Act of June 29, 1906, ch. 3599, 34 Stat. 611 ("former Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 ("former Uintah Reservation"); Act of May 14, 1920, ch. 187, 41 Stat. 599-600 ("former Uintah Indian Reservation"); see also Presidential Proclamation of Sept. 1, 1906, 34 Stat. 3228 (referring to the "former Uintah Indian Reservation"). Indeed, one statute referred to the "allotted lands of any Indian of the former Uintah * * * reservation," Act of Apr. 30, 1908, ch. 153, 35 Stat. 95, a reference that can make sense only on the understanding that the allotted lands had left the "reservation" in the general (though inaccurate) sense that they were no longer common lands set aside for and beneficially held by a tribe.

[37] Section 21 of the Act of Mar. 3, 1911, ch. 210, 36 Stat. 1073-1074, refers at one point to persons having made "homestead entry for land in the Uintah Indian Reservation"—a reference that assumes the opened lands remained in the Reservation—and later on the same page refers to "the proceeds of the sale of lands within the ceded Uintah Indian Reservation"—a reference that appears to rest on the opposite assumption. Similarly, the Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285, which compensated the Indians for land set apart for reservoir purposes, see note 8, *supra*, refers to those

amples pointing in both directions leave[s] one with the distinct impression that subsequent Congresses had no clear view whether the opened territories were or were not still part of the * * * Reservation." 465 U.S. at 479.[38] Given the hazards involved in attempting to infer the intent of one Congress from the views of subsequent Congresses, see *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), the inconsistent references contribute nothing of substance to the decision of this case.

Finally, the Utah Supreme Court relied on its belief that the Department of the Interior had treated the 1902 and 1905 Acts as having diminished the Reservation. See Resp. App. 52a-56a, 57a n.27. As with the statutory materials, many of the items on which the court relied do not address the question at hand.[39] The two formal

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lands as lying "in the former Uintah Indian Reservation," but later in the same paragraph states that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished."

[38] To the extent conclusions can be drawn from the legislative record, it appears that Utah's Senators Sutherland and Smoot were the principal sources of references suggesting that the 1902 and 1905 Acts had diminished the Reservation. Such references ceased shortly after Senator Sutherland's departure from the Senate in 1917. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

[39] The bulk of the materials the court cites at Resp. App. 57a n.27 do nothing more than refer incorrectly to the "former" Uintah Indian Reservation. See H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C.F. Darrabee, Acting Commissioner of Indian Affairs, to H.C. Means (Sept. 26, 1907), JX 336; Letter from First Assistant Secretary of the Department of the Interior to Commissioner of Indian Affairs (Nov. 8, 1907), JX 338; Letter from Secretary of the Department of the Interior to Secretary of the Treasury (Dec. 19, 1908), JX 341. Moreover, given the limited information contained in those documents, it is difficult to ascertain whether the documents involved portions of the Reservation that were opened to settlement under the 1905 Act, rather than land

notices of the Secretary on which the court relied are as ambiguous as much of the statutory material, although on balance they seem to support our understanding.[40] To be sure, some of the items do include statements by lower level officials in the Department of the Interior indicating that the lands opened to non-Indian settlement under the 1905 Act were removed from the Reservation.[41] But, in light of the inconsistent practice of Congress and the Secretary, there is no basis for relying on those statements to provide a definitive resolution of the question against the Tribe.

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At bottom, the 1902 and 1905 Acts do not contain the clear expression of intent to change the Reservation's

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that might have been affected by one of the other actions Congress had taken with respect to the Reservation.

[40] Although the 1945 Order Notice, 10 Fed. Reg. 12,409, discussed at length at Resp. App. 52a-54a, does state at one point that the lands not sold pursuant to the 1902 and 1905 Acts should be "added to and made a part of the existing reservation," at an earlier point it describes those lands as "lands which are now or may hereafter be classified as undisposed-of opened lands *of the Uintah and Ouray Reservation.*" *Ibid.* (emphasis added). The latter reference rests on the assumption that the lands in question had never been severed from the Reservation. Similarly, the 1971 Order Notice, 36 Fed. Reg. 19,920, states that the lands in question "were restored to the public domain"; it does not state that they were severed from the Reservation. Indeed, the notice refers at another point to "the undisposed-of opened lands of said reservation" being "restored to tribal ownership," suggesting that the opening of the lands had altered ownership but not severed the lands from the Reservation. *Ibid.* For a similar reference, see Commissioner of Indian Affairs, *Annual Report* 44 (1918), JX 394 (referring to "areas of unallotted land within this reservation" that had been opened to homestead entry).

[41] 1929 Annual Report of Uintah and Ouray Agent 1, JX 420; 1931 Annual Report of Uintah and Ouray Agent 4-6, JX 425; 1932 Annual Report of Uintah and Ouray Agent 1-2, JX 427; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada, & Utah* 151, 155 (1976), JX 480.

boundaries that this Court's cases have required. Nor can the State establish the type of widely shared understanding of the effect of those Acts that would justify treating the Acts as going farther than the terms Congress chose to express its action. The Tribe consistently refused to consent to any alteration of the Reservation's boundaries, and Congress never adopted any statute explicitly attempting to alter the boundaries unilaterally. Accordingly, this Court should hold that the Reservation was not diminished by the provisions of the 1905 Act, and its 1902 predecessor, that opened portions of the Reservation to non-Indian settlement.

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

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JUNE 1993

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-1436

YANKTON SIOUX TRIBE OF INDIANS, PETITIONER

v.

STATE OF SOUTH DAKOTA, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 796 F.2d 241. The prior opinion of the court of appeals is reported at 683 F.2d 1160. The opinion of the district court (Pet. App. 9-33) is reported at 604 F. Supp. 1146, and the prior opinions of the district court are reported at 566 F. Supp. 1507 and 521 F. Supp. 463.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986, and a timely petition for rehearing was denied on November 7, 1986 (Pet. App. 34). On January 29, 1987, Justice Blackmun extended the time within which to file the petition for a writ of certiorari to and including March 9, 1987. The petition for a writ of

certiorari was filed on March 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the title to the bed of Lake Andes, a shallow, navigable water body of approximately 4,000 acres in South Dakota. Lake Andes lies within the exterior boundaries of the Yankton Sioux Indian Reservation, which was established by the 1858 Treaty with the Yankton Tribe of Sioux, 11 Stat. 743 (Pet. App. 35-46). In 1803, the United States acquired sovereignty over the lands at issue by the Louisiana Purchase. In the years following 1803, the Yankton Sioux began moving into the general area in the vinicity of Lake Andes. Pet. 5. In Article I of the 1858 Treaty, the Tribe ceded and relinquished to the United States all of the lands claimed by them "except four hundred thousand acres thereof" (Pet. App. 36). The exterior boundary of this reservation was described in Article I, and Lake Andes falls within that boundary.

The State of South Dakota was admitted into the Union by the Act of February 22, 1889, ch. 180, 25 Stat. 676. Several years thereafter, in 1892, the United States and the Tribe entered into a cession agreement, which was later ratified by Congress as part of the Indian Department Appropriations Act of 1894, ch. 290, § 12, 28 Stat. 314-319. Article I of the Cession Agreement stated that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314). In return, Article II provided that "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000)" (28 Stat. 315).

2. The Lake Andes Migratory Waterfowl Refuge was established by Executive Order No. 7292, dated February 14, 1936, "in order to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) * * *." In the following years, the Fish and Wildlife Service began to acquire property interests to allow it to control and manage Lake Andes as part of the Refuge. In 1939, the State of South Dakota and the United States executed an agreement by which the State, which had asserted title to the lakebed, granted the United States an exclusive and perpetual right to operate and maintain the lakebed for migratory waterfowl and wildlife conservation purposes. Pet. App. 11-12. Since that time, Lake Andes has been managed by the Fish and Wildlife Service (or its predecessor agencies) in the Department of the Interior as the most important component of the Refuge.

3. In the summer of 1976, the bed of Lake Andes was dry and had become covered with vegetation. Three non-Indians obtained permits from the State and began to harvest kochia (fireweed) from the bed. The Tribe then intiated this action in the United States District Court for the District of South Dakota against the non-Indians, alleging that they were trespassing upon Indian lands. Subsequently, the State and Charles Mix County intervened as defendants, the individual defendants were dismissed from the suit, and the case proceeded, in essence, as a quiet title action. Pet. App. 3, 12.

On September 19, 1981, the district court entered summary judgment in favor of the Tribe. *Yankton Sioux Tribe v. Nelson*, 521 F. Supp. 463. The court ruled that the Tribe held aboriginal title to the lakebed prior to the 1858 Treaty, that its aboriginal title was not expressly extinguished by the United States, and that, for this reason, title to the lakebed had not passed from the United States to the State, under the Equal Footing Doctrine, upon its admission to the Union. See Pet. App. 3-4.

The court of appeals vacated the district court's judgment and remanded the case without resolving the merits. 683 F.2d 1160 (1982). Rather, noting that the parties were advancing conflicting theories of ownership that depended upon whether Lake Andes was navigable at various times, the court of appeals instructed the district court to make findings concerning the navigability of the Lake at the time of the 1858 Treaty and at the time South Dakota was admitted to the Union in 1889. See Pet. App. 4.

4. On remand, the district court found that Lake Andes was navigable in law and in fact at the relevant times and again entered judgment in favor of the Tribe. 566 F. Supp. 1507 (1983).

In September 1983, while post-judgment motions were pending before the district court, the United States moved to intervene as a plaintiff. The motion to intervene was accompanied by a proposed complaint and cross-claim, in which the United States asserted a property interest in the bed of Lake Andes free from any beneficial interest of the Tribe.[1] The intervention motion was granted by the district court (Pet. App. 12-13), which then again entered judgment in favor of the Tribe (*id.* at 9-33).

Relying upon the judgments entered in two actions brought by the Tribe against the United States pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.*, in which the Tribe had recovered awards relating to the lands that it ceded in the 1858 Treaty and the 1892 Cession Agreement, the court first held that the United States was barred by the doctrine of collateral estoppel from contesting the Tribe's claim of aboriginal title to the lakebed as of 1859 (Pet. App. 15-

[1] The United States did not request any determination of the status of its interests vis-a-vis those of the State, nor has the State ever requested any such determination. Hence, the question whether the State or the United States has the better claim to the lakebed is not at issue in this case.

18). The court further held that the Tribe's title to the lakebed had not been extinguished by events other than the 1858 Treaty or the 1892 Cession Agreement, including the United States' establishment and maintenance of the Wildlife Refuge, and that the Tribe had not voluntarily abandoned its beneficial ownership of the lakebed (Pet. App. 18-26). On these grounds, the court concluded that "[t]he Yankton Sioux Tribe of Indians owns the bed of Lake Andes" (*id.* at 33).

5. The State, the County and the United States appealed. The State and County argued that the State had acquired unencumbered title to the lakebed under the Equal Footing Doctrine upon South Dakota's admission to the Union and, in the alternative, that any interest that the Tribe might have had in the lakebed was extinguished by the 1892 Cession Agreement. Although the United States had supported the State's Equal Footing Doctrine argument in district court, it did not renew that argument on appeal.[2] Instead, the United States contended that the 1892 Cession Agreement had extinguished any interest the Tribe might have had in the lakebed and that the United States was not collaterally estopped from challenging the Tribe's claims of ownership.

The court of appeals reversed (Pet. App. 1-8). The court held that, under the Equal Footing Doctrine, the United States, upon acquiring the Louisiana Territory, immediately began to hold lands underlying navigable waters within the acquired territory, including Lake

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[2] The United States urged that the case instead should be resolved on the "narrow ground" that the 1892 Cession Agreement extinguished any interest the Tribe might have had. The United States further stated: "[W]e note that the Equal Footing Doctrine argument is one that is most appropriately raised by a state itself, rather than by the United States, and that the State of South Dakota is in fact ably making that argument in its own appeal. Hence, there is no need here for the United States to repeat that same argument on its own behalf." U.S. Br. 22 n.14.

Andes, in trust for future States (Pet. App. 4-5). The court found that the Tribe's aboriginal title in the area did not attach until after it was acquired by the Louisiana Purchase (*id.* at 7), and it held that such a claim of aboriginal title arising after the United States acquired the territory in question cannot defeat the State's title. In the court's words: "Even assuming that aboriginal title can ever attach to the bed of navigable waters, we hold that when sovereign title is in place and operation of the equal footing doctrine begins before any claim of aboriginal title has ripened, the state's claim of ownership is preeminent unless a recognized exception to the equal footing doctrine is applicable" (*id.* at 7). Finding no conveyance of the lakebed to the Tribe that was either "explicit or clearly inferrable from the circumstances" (*ibid.*, citing *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981), and *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926)), the court concluded that the lakebed passed to the State of South Dakota in 1889 under the Equal Footing Doctrine (Pet. App. 7-8). The court therefore found it unnecessary to address any of the other issues presented (*id.* at 8).

ARGUMENT

The court of appeals' conclusion that the Yankton Sioux Tribe holds no present ownership interest in the bed of Lake Andes is correct, and its decision presents no question of general importance warranting review by this Court.

1. The United States has managed Lake Andes as the principal component of the Lake Andes National Wildlife Refuge for almost 50 years. In the court of appeals, the appellants made two independent arguments concerning ownership of the bed of Lake Andes, either of which would fully sustain the United States' right to continue to manage the Lake and its bed as part of the Refuge and would, correspondingly, defeat the Yankton Sioux Tribe's claim of aboriginal title to the lakebed.

First, the United States and the State argued that the Tribe had ceded any interest it had in the lakebed to the United States in the 1892 Cession Agreement. That Agreement necessarily conferred on the United States, at least as against the Tribe, the right to exercise complete control over the lakebed for wildlife conservation or other purposes. Second, the State argued that the Tribe did not have aboriginal title to the lands prior to the Louisiana Purchase in 1803; that after 1803, the United States held the bed in trust, to be conveyed to the future State of South Dakota under the Equal Footing Doctrine; and that aboriginal title could not attach during this period in a manner that would defeat the State's claim under the Equal Footing Doctrine after statehood. Because the State thereafter granted the United States a permanent easement to enable it to maintain Lake Andes as part of a wildlife refuge, the United States succeeded to any interests the State acquired under the Equal Footing Doctrine to the extent necessary to assert control over the lakebed for refuge purposes. Accordingly, under this second argument as well, the Tribe's claim of aboriginal ownership would be defeated.

The United States did not rely in the court of appeals on the second rationale just discussed, but the court of appeals nevertheless adopted it. See pages 6-7 and note 2, *supra*.[3] This rationale presents novel theoretical issues regarding the interrelationship between a State's rights under the Equal Footing Doctrine and a tribe's claim of aboriginal title that attached to the same submerged land after the United States acquired the territory. Petitioner Yankton Sioux Tribe appears to acknowledge that its

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[3] The court of appeals determined as a factual matter that the Tribe's exclusive occupancy of the area did not begin until after the Louisiana Purchase in 1803 (Pet. App. 6-7). That fact-bound holding does not warrant review by this Court. In any event, the Tribe concedes that "[t]he United States acquired sovereign title to the area in 1803 before the Tribe's use of the area had ripened into aboriginal title" (Pet. 5 n.2).

aboriginal claim, whenever it attached, would not actually defeat the State's *fee title* to the lakebed under the Equal Footing Doctrine, and that the Tribe therefore would have no more than the traditional aboriginal right to use or occupy the lakebed until that right was extinguished by the United States. See Pet. 6-8. Accordingly, as the Tribe suggests (Pet. 7), it might be legally possible for the courts to recognize both the Tribe's aboriginal claim and the State's fee-title claim to the same lakebed.

It might also be that the Tribe is correct that an absolute rule that aboriginal rights can *never* attach to lands underlying navigable waters after the United States acquired the territory would go too far. Thus, we may assume for present purposes that if a tribe moved into a new area on the public domain, the tribe, after the passage of an appropriate period, might be held to have acquired a new homeland on the public domain. By the same token, the United States might be held to have sufficiently acknowledged that new home by some official act. In that event, it would not be unreasonable to conclude that some or all of the tribe's aboriginal rights had been effectively transferred to the new location. And in appropriate circumstances, it is possible that this aboriginal right in turn might extend in some meassure to a navigable body of water and its underlying bed—at least if the water body was sufficiently central to the tribe's way of life at the new location and was regarded as such by responsible federal officials. Cf. *Montana* v. *United States*, 450 U.S. at 556. Even then, however, it would be necessary to reconcile the respective interests of the tribe and the State in order to define the nature and extent of such aboriginal rights, if any, that were thus acquired and that were later retained by the tribe when the fee title to the bed itself passed to the State upon its admission to the Union.

There is, however, no need for the Court to address these difficult theoretical and factual issues in this case. Questions concerning the recognition of aboriginal rights

in lands underlying navigable waters have arisen only rarely in the lower courts. Moreover, as the State argues (Br. in Opp. 7-8), and as the Tribe concedes (Pet. 7-8 nn. 4-5), the Eighth Circuit's treatment of those issues in this case does not directly conflict with the appellate decisions petitioner cites (Pet. 7-8)—*Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F.2d 935 (Ct. Cl. 1974); *United States* v. *Romaine*, 255 F. 253 (1919); and *Heckman* v. *Sutter*, 119 F. 83 (1902) —because the question whether aboriginal title ripened after the United States acquired the territory was not actually litigated in those cases. See also *United States* v. *Pend Oreille Cty. Pub. Util. Dist. No. 1*, 585 F. Supp. 606, 608 (W.D. Wash. 1984), quoted at Pet. 12 ("The courts have never squarely addresed the question of the competing claims to the same navigable waters by an Indian tribe and a state, where the Indian claim is based on aboriginal title."). Finally, we submit that resolution of the issues the Eighth Circuit chose to address is unnecessary to the outcome of this case, because, as we explain below, the United States' right to control Lake Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement.

2. a. Article I of the 1892 Cession Agreement states that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to *all the unalloted lands* within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314 (emphasis added)). The bed of Lake Andes, of course, consisted entirely of unallotted lands. Hence, under the plain language of Article I, whatever interest the Tribe might once have had in the lakebed passed from the Tribe to the United States in 1892. Several considerations reinforce the conclusion that the explicit text of Article I should be given its natural effect of defeating any continuing claim of title by the Tribe.

First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), Slip op. 15 n.19; *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering a similar and contemporaneous cession agreement, found that the same language was "precisely suited" to the purpose of conveying to the United States, "for a sum certain, *all* of [the Indians'] interest in *all* of their unallotted lands."

Second, the retention of the lakebed by the Tribe would have been inconsistent with the purposes of the 1892 Cession Agreement. Those purposes consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. As this Court stated in *Solem* v. *Bartlett* (465 U.S. at 468 (footnote omitted)):

> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.

Finally, there is nothing in the extensive legislative history of the 1892 Cession Agreement to indicate that the parties intended that the Tribe would retain any ownership interest in the bed of Lake Andes. See S. Rep. 196, 53d Cong., 2d Sess. (1894); H.R. Rep. 570, 53d Cong., 2d Sess. (1894); S. Misc. Doc. 134, 53d Cong., 2d Sess. (1894). If such an exception had been intended, it is reasonable to expect some mention of that fact in the

account of the negotiations contained in the legislative history.

b. The Tribe cites (Pet. 9-10) several post-1892 statutes that it believes support the contention that it owns the lakebed. Those statutes, however, do not support the Tribe's position. In 1896 and 1906, Congress passed two measures appropriating funds for the purpose of enabling the Secretary of the Interior to "put down an artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation * * * for the purposes of supplying said Indians with water for domestic purposes, for stock, and for irrigation purposes" (Indian Appropriations Act of 1896, ch. 398, 29 Stat. 343; Indian Appropriations Act of 1906, ch. 3504, 34 Stat. 371). It is apparent from the text of the Acts that their purpose was to provide a source of water for Indian allotments located upland of Lake Andes. Hence, those statutes shed no light on the question of the ownership or use of lands underlying the Lake itself.

Thereafter, in 1922, Congress enacted a statute authorizing the Commissioner of Indian Affairs to construct and maintain a spillway to stabilize the Lake's maximum elevation. Act of Sept. 21, 1922, ch. 358, 42 Stat. 990. The legislative history of this provision shows that its purpose was to prevent the flooding of adjacent farmlands, including lands "held by Indians under Government restrictions," from the rising waters of Lake Andes. See H.R. Rep. 1073, 67th Cong., 2d Sess. (1922). The 1922 Act thus likewise does not suggest that the Tribe retains aboriginal ownership of the bed of Lake Andes.

3. For the foregoing reasons, it is clear that the 1892 Cession Agreement terminated any ownership interest that the Tribe then had in the bed of Lake Andes.[4] Accord-

[4] The district court found that the United States was precluded by collateral estoppel "from litigating the issues of aboriginal title and the Cession Agreement of 1892" (Pet. App. 15-16). The district court relied upon the judgments entered in two Indian Claims

ingly, even if the tribe once had an interest in the lakebed that survived South Dakota's admission to the Union in 1889, any such interest was promptly extinguished in 1892. Accordingly, the judgment of the court of appeals, which rejects the Tribe's claim of a *present* ownership interest in the lakebed, is clearly correct. The decision below therefore does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

Commission proceedings in which the Yankton Sioux Tribe recovered awards relating to the lands that it had ceded in the 1858 Treaty and the 1892 Cession Agreement (*id.* at 16-17).

Plainly, however, neither of the two Commission judgments barred the United States from challenging the Tribe's ownership of the lakebed in this case. The action regarding lands ceded by the 1858 Treaty, *Yankton Sioux Tribe* v. *United States*, 24 Ind. Cl. Comm. 208 (Docket No. 332-C), aff'd, *Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974), was based on a claim for compensation only for lands outside of the exterior boundaries of the reservation established by that Treaty. Because Lake Andes was within the reservation boundaries, the lakebed was not at issue in that action. The second Commission judgment, entered in *Yankton Sioux Tribe* v. *United States*, aff'd, *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159 (Ct. Cl. 1980) (Docket No. 332-D), involved a claim seeking compensation for lands ceded under the 1892 Cession Agreement. However, as the Tribe conceded below (Br. 32), it specifically framed its claim so as to *exclude* the bed of Lake Andes. See 623 F.2d at 183; Pet. App. 17. As a result, no question concerning the lakebed was placed in issue in that case. In any event, collateral estoppel would not bar the State from asserting an interest in the lakebed, since the State was not a party to the proceedings before the Indian Claims Commission.

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1581

STATE OF SOUTH DAKOTA, PETITIONER

v.

YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the boundaries of the Yankton Sioux Indian Reservation. Those boundaries affect the United States' law enforcement authority under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. In addition, the United States, because of its special relationship with the Indian Tribes, has a strong interest in protecting the integrity of reservation boundaries and in promoting tribal self-government within those boundaries.

STATEMENT

1. a. In the Treaty of April 19, 1858, 11 Stat. 743 (the 1858 Treaty), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, about 11 million acres, except for a 430,000-acre Reservation in Charles Mix County in southeastern South Dakota. Art. 1 (Pet. App. 100). The Treaty specifically delineated the boundaries of the Res-

ervation, which was said to consist of "four hundred thousand acres." *Ibid.*[1] In return, the United States agreed, among other things, "[t]o protect the * * * Yanctons in the quiet and peaceable possession of the said tract * * * so reserved for their future home." Art. 4 (Pet. App. 102). The Treaty further provided that "[n]o white person," with some exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians." Art. 10 (Pet. App. 108).

b. Toward the end of the 19th century, Congress began to question the policy, reflected in the 1858 Treaty, of setting aside large tracts of land as permanent homes for Indian Tribes. See *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau* v. *District County Court*, 420 U.S. 425, 431 (1975). Congress was faced at that time with a "continuing demand for new lands for the waves of homesteaders moving west," *Solem*, 465 U.S. at 466, but was constrained by treaty provisions that, like Article 10 of the 1858 Treaty, prohibited white settlement on Indian reservations. In addition, Congress believed that the Indians would benefit from "assimilation into American society," which would be accelerated by their "abandon[ing] their nomadic lives on the communal reservations and settl[ing] into an agrarian economy on privately owned parcels of land." *Ibid.*

In response to those concerns, Congress passed the General Allotment Act, commonly known as the Dawes Act, in 1887. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. The Dawes Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432. As this Court has

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[1] A subsequent survey determined that the Reservation actually encompassed some 430,000 acres. See Pet. App. 69.

recognized, while the elimination of Indian reservations may have been Congress's ultimate goal, the actual consequence of allotment was often "to continue the reservation system," at least for the time being. *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973).

c. By 1892, much of the Yankton Sioux Reservation had been allotted to individual members of the Tribe pursuant to the Dawes Act. Pet. App. 71. In that year, Congress appropriated funds for the Secretary of the Interior "to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress." Act of July 13, 1892, ch. 164, § 1, 27 Stat. 137. The Secretary appointed three commissioners to conduct such negotiations with the Yankton Sioux. Pet. App. 71.

The Commissioner of Indian Affairs in the Department of the Interior instructed the commissioners to attempt to acquire all, or at least some portion, of the Tribe's surplus lands on terms that "should be just and equitable to the Indians as well as the United States." J.A. 99. The commissioners were provided with a form of agreement as "an indication of the views" of the Office of Indian Affairs, but were "not required to adhere to [it] absolutely." J.A. 101 (emphasis omitted).

In an agreement dated December 31, 1892 (the 1892 Agreement), the Tribe ceded to the United States, for $600,000, all of its surplus lands. Arts. I & II (Pet. App. 112-113). As the commissioners noted in their report to the Secretary of the Interior, those lands were "not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians." J.A. 137.[2] The Agree-

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[2] The form agreement, which we have lodged with the Clerk of the Court, did not propose to pay the Tribe a sum certain for its lands. Instead, the lands were to be appraised and offered for sale in 160-acre parcels at no less than a specified price per acre. The provision paying

ment reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Art. VIII (Pet. App. 116).

The Agreement, unlike the Office of Indian Affairs form, contained a savings provision, which expressly preserved the Tribe's rights under the 1858 Treaty that created the Reservation:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Art. XVIII (Pet. App. 120).[3]

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the Tribe a flat $600,000 for the lands appears to have been adopted for administrative convenience. The commissioners explained that the appraisal option "would accomplish only about one-third of the work which the Government and the Indians desired to accomplish by this transaction," because only the most desirable land would have sold at or above the minimum price then agreeable to the Tribe. J.A. 136. It then "would have been necessary to enter into a new agreement with [the Tribe], reducing the minimum price" when the land failed to sell. *Ibid*.

[3] In addition, the Agreement contained a provision, insisted upon by the Tribe, prohibiting the selling or giving away of "intoxicating liquors" upon "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120).

d. Congress "accepted, ratified, and confirmed" the Agreement without change and incorporated it, together with several other surplus land agreements, into an omnibus Indian appropriations act (the 1894 Act). Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (Pet. App. 122). The congressional ratification debates raised various concerns about the Agreement, including whether the purchase price was too high and whether the Indians should be paid only when, or if, the lands were sold to settlers. J.A. 381-382, 403-427, 437-444. But there was no discussion of whether the Agreement, if ratified, would alter the boundaries of the Reservation.[4]

e. On May 16, 1895, President Cleveland issued a proclamation declaring that "all of the lands acquired from the Yankton tribe" by the 1892 Agreement, aside from those reserved for agency, school, and other purposes, were "open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement" and all applicable laws. J.A. 456. The proclamation incorporated a "Schedule of Lands within the Yankton Reservation, to be opened to settlement by Proclamation of the President." *Ibid.*

2. In 1993, the Southern Missouri Recycling and Waste Management District (the Waste District) purchased, from a non-Indian, a parcel of land within the original boundaries of the Yankton Sioux Reservation. Pet. App. 91. The Waste District sought to develop the land as a regional solid waste landfill. *Ibid.* After a hearing before the South Dakota Board of Minerals and Environment, at

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[4] The Act also included various implementing provisions. See Pet. App. 122-124. Those included a requirement that the sixteenth and thirty-sixth sections of each township on the opened lands be "reserved for common-school purposes" and be "subject to the laws of the State of South Dakota." *Id.* at 123.

which the Tribe opposed the landfill, the Waste District obtained a permit for the project. *Id.* at 91-92.

The Tribe then commenced this suit to enjoin construction of the landfill. Petitioner State of South Dakota was joined as a third-party defendant. Pet. App. 93. After trial, the district court concluded that "Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe." *Id.* at 96.[5]

The court of appeals affirmed. Pet. App. 1-65. The majority acknowledged that the provisions in Articles I and II of the Agreement providing for cession of surplus lands in return for a fixed payment might, in other circumstances, indicate congressional intent to diminish a reservation. *Id.* at 14-15. However, the totality of the 1894 Act's text and legislative history—and, in particular, the savings provision of Article XVIII—did not, in the majority's view, establish that Congress intended to diminish the Reservation. *Id.* at 21, 27, 43-44. The dissent argued that the "cession" and "sum certain" language of Articles I and II alone provided sufficient evidence of diminishment. *Id.* at 44.

SUMMARY OF ARGUMENT

Under the Court's surplus land act jurisprudence, only Congress can diminish an Indian reservation. Its intent to do so must appear in the text of the statute itself or be clear from the surrounding circumstances. A congressional intent to diminish is not found lightly, and any ambiguities must be resolved in favor of the Indians.

The text of the 1894 Act, read in light of those principles, does not evince a clear congressional intent to dimin-

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[5] At the same time, the district court found that the Tribe had not demonstrated that it had regulatory authority over the landfill project. Pet. App. 96. The Tribe did not appeal that ruling. *Id.* at 6 n.5.

ish the Yankton Sioux Reservation. To be sure, the Act and the Agreement that it ratified contain language of cession and lump sum payment that, without more, has been held sufficient to establish such intent in other cases. But there *is* more in this case. The savings provision contained in Article XVIII of the Agreement, and incorporated by Congress into the Act, declares that "all provisions" of the 1858 Treaty are to remain "in full force and effect." Article XVIII thus preserves the first Article of the Treaty, which sets forth the boundaries of the Reservation. At a minimum, the savings provision manifests sufficient ambiguity as to Congress's intent regarding the reservation boundaries that the matter must be resolved in favor of the Tribe. That conclusion is reinforced by the provisions of the Agreement and the Act that reserve from sale to settlers those surplus lands occupied by the United States for agency, school, and other purposes; that reserve (but do not grant to the State) township sections for school purposes; and that prohibit the introduction of liquor onto the ceded lands or "any other lands within or comprising" the Reservation as delineated in the 1858 Treaty.

Nor do the course of negotiations with the Tribe, the debates on the 1894 Act, and other surrounding events provide the "unequivocal[]" evidence necessary to demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem* v. *Bartlett*, 465 U.S. 463, 471 (1984). Petitioner concedes as much. Pet. Br. 28-29. And tribal members have remained, to this day, a substantial portion of the population within the original reservation boundaries.

Finally, the subsequent treatment of the reservation lands has been "rife with contradictions and inconsistencies." *Solem*, 465 U.S. at 478. However, on two occasions, in 1913 and 1941, when the federal government considered

the issue, it concluded that the Reservation was not diminished. The Court should reach the same conclusion here.

ARGUMENT

THE YANKTON SIOUX INDIAN RESERVATION HAS NOT BEEN DIMINISHED

This Court has recognized that each case involving whether a surplus land act has altered Indian reservation boundaries is unique, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). "[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not," but instead "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 469, 470 (citations omitted); see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977) ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.").[6]

In a series of modern decisions concerning the effects of turn-of-the-century surplus land acts, the Court has followed several "well-established legal principles" in as-

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[6] An Indian reservation does not imply total Indian or federal ownership or control of all of the lands within its boundaries. The term instead refers to the geographical area within which the Tribe's authority over its territory and its members is primary. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). It also describes an area in which the federal government exercises criminal jurisdiction in matters affecting Indians, see 18 U.S.C. 1151, and in which the services of the Bureau of Indian Affairs are focused. Reservation status does not eliminate all jurisdiction of the State with regard to non-Indians, especially in their relations with other non-Indians. See, *e.g.*, *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404 (1997); *United States* v. *McBratney*, 104 U.S. 621 (1881).

sessing whether such an act has diminished a reservation. *Rosebud Sioux*, 430 U.S. at 586-587; see, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994); *Solem*, 465 U.S. at 470-472; *Mattz* v. *Arnett*, 412 U.S. 481, 504-505 (1973). The "first and governing principle" is that, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks and ellipses omitted). Its intent to do so "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505. The "most probative evidence" of such intent is, of course, the actual language of the surplus land act. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470.

Second, while events surrounding the passage of a surplus land act are relevant, they rarely are sufficient, in themselves, to establish that Congress intended to alter reservation boundaries if the act itself is silent or ambiguous. *Solem*, 465 U.S. at 471. It is only when such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation" that they can sustain an inference that "Congress shared the understanding that its action would diminish the reservation." *Ibid.*[7]

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[7] Moreover, the Court has been "careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Hagen*, 510 U.S. at 411. The latter shed far less light on the intent of the Congress that adopted the act.

Third, the diminishment of an Indian reservation "will not be lightly inferred." *Solem*, 465 U.S. at 470; accord *Hagen*, 510 U.S. at 411. Any ambiguities in the surplus land act, its legislative history, or the surrounding context are to be resolved "in favor of the Indians." *Ibid.*; *Rosebud Sioux*, 430 U.S. at 586 ("[D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."). Accordingly, absent "substantial and compelling evidence of a congressional intention to diminish Indian lands," the Court has considered itself "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

No such "substantial and compelling evidence" exists here. The text of the 1894 Act, the circumstances surrounding its enactment, and subsequent events do not demonstrate with the requisite clarity that Congress intended to diminish the Yankton Sioux Reservation.

A. The Savings Provision Of The 1892 Agreement And The 1894 Act Precludes Any Determination That Congress Clearly Intended To Diminish The Reservation

Nowhere in the 1894 Act, the underlying 1892 Agreement, or the records of the negotiations and congressional debates is there any express statement that the Reservation was to be "abolished," "discontinued," "vacated," or otherwise disestablished or diminished. Congress used such language in a number of contemporaneous statutes involving Indian reservations. See *Mattz*, 412 U.S. at 504 n.22 (citing such statutes). It chose not to do so here.

In the absence of such language, provisions in a surplus land act that accept a Tribe's "cession" of reservation lands in return for a sum certain, where unqualified by other provisions, have been held sufficient to create a

strong presumption that Congress intended to diminish a reservation. See *Solem*, 465 U.S. at 470-471; *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975). But no such inference is warranted in a case such as this one, in which the ceded lands were scattered over the reservation (see J.A. 137) and Congress, in the same surplus land act, imposed conditions on the transaction that reasonably may be read as preserving the existing reservation boundaries.

The savings provision in Article XVIII of the 1892 Agreement, which Congress incorporated verbatim into the 1894 Act, contains such conditions with respect to the Yankton Sioux Reservation. Article XVIII begins by expansively providing that "[n]othing in this agreement" —necessarily including the cession and lump sum payment provisions of Articles I and II—"shall be construed to abrogate the [1858] treaty." Pet. App. 120. It then further declares that, "after the signing of this agreement, and its ratification by Congress, all provisions of the [1858] treaty * * * shall be in full force and effect, the same as though this agreement had not been made." *Ibid.* No exception is made for the first Article of the 1858 Treaty, which created the Reservation and delineated its boundaries. *Id.* at 100; see also Treaty, Art. 4 (Pet. App. 103) (recognizing that the Reservation was to be the Tribe's "permanent" home). Nor is any exception made for the other provisions in the Treaty that contemplate tribal self-government within the reservation boundaries.[8]

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[8] For example, Article 11 of the Treaty recognizes the federal government's authority over "matters of dispute and difficulty between [the Tribe] and other Indians," and thus, by implication, the Tribe's authority over internal matters. Pet. App. 108-109. That same article contains the Tribe's agreement to assist in enforcing federal "treaties, laws, or regulations * * * within the limits of [the] reservation." *Id.* at 109. See *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (law enforcement authority over tribal members is an inherent aspect of tribal self-government).

Article XVIII is considerably broader than the savings provisions contained in most other Indian agreements. See Pet. App. 16-18 & n.12, 81 (contrasting language of other agreements). It differs significantly from the more common savings provisions that simply preserve "benefits" or rights created under earlier treaties or agreements "*not inconsistent* with the provisions of this agreement." *Rosebud Sioux*, 430 U.S. at 623 (Marshall, J., dissenting) (quoting Rosebud Sioux agreement, Act of Apr. 23, 1904, ch. 1484, § 1, Art. V, 33 Stat. 255) (emphasis added); see *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 760-761 (1985) (quoting similar savings provision).[9]

Petitioner offers three reasons why Article XVIII should not be read to rebut any presumption created by the cession and lump sum payment language of Articles I and II. Pet. Br. 20-28. None of those arguments has merit.

First, petitioner contends (Br. 21-22) that Article XVIII should be construed solely "to preserve the annuities due the Tribe under the Treaty of 1858." But Article XVIII concludes with a separate clause specifically providing that "the said Yankton Indians shall continue to receive their annuities under the [1858] treaty." Pet. App. 120. Petitioner's proposed construction would render superfluous all of the preceding language of Article XVIII, in contravention of the canon that "[s]tatutes must be inter-

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[9] None of the other surplus land agreements ratified along with the 1892 Agreement contains a similar savings provision. The agreements with the Cour d'Alene, Alsea, and Yuma Indians contain no savings provision at all. See Act of Aug. 15, 1894, ch. 290, §§ 14-15, 17, 28 Stat. 322-326, 332-336. The agreement with the Nez Perce Indians contains a provision that preserves those portions of earlier treaties "not inconsistent with the provisions of this agreement." § 16, 28 Stat. 331. A brief amicus curiae has been filed by Lewis County, Idaho, arguing that the Nez Perce agreement diminished that Tribe's Reservation. That issue is not before the Court or, indeed, before any court at this time.

preted, if possible, to give each word some operative effect." *Waliers* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997); see *United States* v. *Alaska*, 117 S. Ct. 1888, 1918 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation marks omitted).[10]

Second, petitioner contends (Br. 23-24) that Article XVIII, aside from its annuity clause, should be disregarded because it is "ambiguous" or "inconsistent." Principally, petitioner argues that Article XVIII's preservation of "all provisions" of the 1858 Treaty is inconsistent with Articles I and II, because the 1858 Treaty gave the Tribe "possession" of all reservation lands whereas Articles I and II transfer possession of some of those lands to the United States. But the appropriate judicial response to tension between different provisions of the same statute is not to read one of those provisions out of the statute. This Court has stressed that "[s]tatutory construction is a holistic endeavor," which, "at a minimum, must account for a statute's full text." *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks omitted); see *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949) ("If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole."). It is thus essential "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section," *United States* v. *Menasche*, 358 U.S. 528, 538-539 (1955)

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[10] Moreover, while the historical materials cited by petitioner (Br. 21-23) demonstrate that some members of the Tribe were concerned at the time of the 1892 negotiations with the preservation of their annuities, they do not suggest that Article XVIII was drafted solely to address those concerns.

(internal quotation marks omitted), as petitioner would do here.

The 1894 Act may readily be construed to give effect to Article XVIII as well as Articles I and II. As the court of appeals recognized, all three provisions may be reconciled by construing the Act as conveying certain real property within the Reservation to the United States, for subsequent sale to non-Indian settlers, while preserving "as much of [the 1858] treaty as possible." Pet. App. 20-21. In other words, the Agreement and the Act may reasonably be read as simply opening the surplus lands for settlement "within established reservation boundaries," *Solem*, 465 U.S. at 470, while preserving those boundaries and the Tribe's right of self-government within them. The Agreement thus modifies only that portion of Article 10 of the 1858 Treaty that excluded white settlers from the Reservation.

We submit that ours is the most plausible "holistic" construction of the Act. But even if petitioner's strained construction, which essentially reads Article XVIII out of the Act, were deemed equally plausible, our construction must prevail. At a minimum, Article XVIII renders the Act sufficiently ambiguous that the diminishment question must be resolved in favor of the Tribe. See *Hagen*, 510 U.S. at 411; *Rosebud Sioux*, 430 U.S. at 586.

Finally, petitioner notes (Br. 26-28) that the Court did not accord significance to savings provisions in holding against diminishment in *Solem* or in favor of diminishment in *DeCoteau*. But the Court's silence is hardly surprising, given that neither the parties to those cases nor the United States as amicus curiae based their arguments on any savings provision. Nor did they have reason to do so. The surplus land act at issue in *DeCoteau* did not even contain a savings provision. See 420 U.S. at 455-460 (reprinting agreement as ratified). And the savings pro-

vision in *Solem*'s surplus land act was weaker than the one here. See Act of May 29, 1908, ch. 218, § 9, 35 Stat. 464 ("nothing in this Act shall be construed to deprive the said Indians * * * of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act").[11] In any event, because each surplus land act case is *sui generis*, turning on the particular "language of the Act and the circumstances underlying its passage," *Solem*, 465 U.S. at 469, no conclusion could properly be drawn from the Court's failure to address a different savings provision in a different surplus land act passed under different circumstances.

B. Other Provisions Of The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

Other provisions of the 1892 Agreement and the 1894 Act reinforce the conclusion, drawn from the savings provision of Article XVIII, that Congress did not clearly manifest an intent to diminish or disestablish the Reservation.

1. *The "agency, schools, and other purposes" provision.* Article VIII of the Agreement reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Pet. App. 116. The Court viewed a virtually identical provision in *Solem* as "strongly suggest[ing]" that Congress did not intend to diminish the reservation,

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[11] Petitioner also notes (Br. 26-27) that the Court observed in *Montana* v. *United States*, 450 U.S. 544, 548 (1981), that a series of surplus land acts had "reduced" the Crow Reservation. Although not mentioned by the Court, two of those acts contained savings provisions. Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1042; Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 43. However, given that the construction of the surplus land acts was not at issue in *Montana*, the Court's statement has no relevance here.

because "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened areas would remain part of the reservation." 465 U.S. at 474. The same is true here.

2. *The "school sections" provision.* The 1894 Act contains a provision (not contained in the underlying 1892 Agreement) excepting from sale to settlers "the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." Pet. App. 123. Petitioner notes that a provision in the surplus land act in *Rosebud Sioux*, which "grant[ed]" the sixteenth and thirty-sixth sections to South Dakota for common schools, was held to indicate diminishment. See 430 U.S. at 600-602. But the Court's rationale in *Rosebud Sioux* is inapplicable here.

As the Court noted in *Rosebud Sioux*, the enabling act admitting South Dakota to the Union provided that the sixteenth and thirty-sixth sections of each township "are hereby granted to [the] State[] for the support of common schools." 430 U.S. at 599 (quoting Act of Feb. 22, 1889, ch. 180, § 10, 25 Stat. 679). That act further provided, however, that when those sections were "embraced in permanent [Indian] reservations," they "shall not, at any time, be subject to the grants * * * until the reservation shall have been extinguished." *Id.* at 599-600 (quoting § 10, 25 Stat. 679). The Court relied primarily on the legislative history of the *Rosebud Sioux* surplus land act to conclude that its school sections provision was intended to implement the school sections provision of the enabling act, and thus that the surplus land act extinguished the reservation status of the land so as to trigger the grant in the enabling act. See *id.* at 600-601 (quoting statement in congressional reports that school sections provision "is in conformity with the guarantee given to the State of South

Dakota by Congress in the enabling act"). No such legislative history exists here.

Nor does the 1894 Act contain the express "grant" language of the *Rosebud Sioux* surplus land act that was held to have implemented the South Dakota enabling act. To the contrary, the 1894 Act simply "reserve[s]" the sixteenth and thirty-sixth sections from settlement without taking the further step of granting them to the State, as contemplated by the enabling act when an Indian reservation is extinguished. Indeed, if the school sections were granted to the State and the Reservation extinguished, there would have been no need for Congress to provide, as it did in the same clause of the 1894 Act, that those sections "shall * * * be subject to the laws of the State of South Dakota." Pet. App. 123. Accordingly, the most natural reading of the school sections provision is that it simply authorizes the State to operate common schools for Indian and non-Indian students on specified lands within the reservation boundaries. At the very least, petitioner errs in contending that the school sections provision affirmatively supports a finding of diminishment. See *DeCoteau*, 420 U.S. at 445-446 n.33 (discussing similar provision).

3. *The liquor prohibition.* The Agreement and the Act also contain a provision that "[n]o intoxicating liquors * * * shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120). Petitioner notes that the Court held that a liquor prohibition in the *Rosebud Sioux* surplus land act indicated diminishment of the reservation. See 430 U.S. at 613-614. The Court reasoned that Congress must have assumed that the opened lands would no longer be Indian country, and thereby

subject to the existing statute prohibiting liquor in Indian country, because otherwise the provision would have been mere surplusage.

There is, however, an equally plausible explanation for why Congress would have included such a provision in the 1894 Act without intending to diminish the Reservation. The term "Indian country," which was not statutorily defined in 1894, was understood to exclude all lands held by non-Indians, even if located within reservation boundaries. See *Solem*, 465 U.S. at 468.[12] It was thus uncertain whether such lands would continue to be covered by the general statute banning liquor in Indian country. Special provisions like that contained in the 1894 Act eliminated any such uncertainty.

It is noteworthy as well that the liquor prohibition in the 1894 Act applies not to the opened lands alone, but to *all* lands within the original reservation boundaries, including lands held by the Tribe that indisputably would

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[12] The term "Indian country," currently defined in 18 U.S.C. 1151, can be traced back to early statutes regulating Indian affairs. In the Indian Intercourse Act of 1834, Congress designated as Indian country all land west of the Mississippi River, not including Missouri, Louisiana, and the Arkansas Territory, and all land east of the Mississippi that was not part of any State, "to which the Indian title has not been extinguished." Ch. 161, § 1, 4 Stat. 729. Changing historical circumstances rendered that definition obsolete. In 1874, the compilers of the Revised Statutes omitted any statutory definition of Indian country, while leaving intact the numerous statutory provisions that used that term. From 1874 to 1948, the task of defining Indian country was left to the judiciary. In the early part of this century, the Court issued a series of decisions that form the basis for Section 1151. See 18 U.S.C. 1151 note. Thus, Section 1151 was, in part, an outgrowth of *Donnelly* v. *United States*, 228 U.S. 243 (1913), which eliminated the requirement that Indian country "be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Id.* at 269. "Only in 1948," with the enactment of Section 1151, "did Congress uncouple reservation status from Indian ownership." *Solem*, 465 U.S. at 468.

remain subject to the general statute banning liquor in Indian country. Congress thus appears to have been concerned simply with adopting a clear, specific, and *permanent* ban on the selling or giving away of liquor anywhere within the Reservation.[13]

Significantly, moreover, because the Act prohibits liquor on "the lands by this agreement ceded and sold to the United States" as well as "any *other* lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty" (Pet. App. 120) (emphasis added), the Act appears to contemplate that the ceded lands would remain "within" the Reservation. The liquor provision in *Rosebud Sioux* contained no such description of the surplus lands as being within the reservation.

Petitioner apparently reads the liquor prohibition's reference to the 1858 Treaty as simply an identification of which lands were subject to the prohibition, not as an indication that all such lands would retain their reservation status. But that is not the most natural reading. It is further undermined by the background of the liquor prohibition, which was included in the 1892 Agreement only because the Tribe had "demand[ed]" it. J.A. 154-155.[14] The commissioners explained that the Tribe had made it an "imperative condition" of the sale of its surplus lands "that whisky should be excluded," because the Tribe "fear[ed] that upon the opening of the Yankton Reserva-

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[13] The 25-year liquor prohibition in *Rosebud Sioux* similarly applied to "lands allotted" and "those retained or reserved," as well as to "the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of." Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451.

[14] That was not the case with the liquor prohibition included 16 years later in the *Rosebud Sioux* surplus land act. See 430 U.S. at 611 (provision recommended by Secretary of Interior).

tion to settlement by white people, drinking saloons would be established in their midst." J.A. 154. That account conveys a clear sense that the Tribe believed that the Reservation would retain its identity and Indian character. The commissioners endorsed the Tribe's condition in terms that reinforce that understanding: they expressed the "hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants *within the limits of the reservation*." J.A. 154-155 (emphasis added).[15]

Thus, far from supporting a finding of congressional intent to diminish the Reservation, as petitioner asserts, the liquor prohibition, like the school sections provision, affirmatively supports a contrary finding. But even if the school sections and liquor provisions were the same as those in *Rosebud Sioux*, the Court has since made clear that such provisions are "suspect" as "independent evidence of a congressional intention to diminish." *Solem*, 465 U.S. at 475 n.18.

C. Events Surrounding The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

The events surrounding the negotiation of the 1892 Agreement and the adoption of the 1894 Act do not demonstrate the requisite clear intent to diminish the Yankton Sioux Reservation. *Mattz*, 412 U.S. at 505. Indeed, petitioner essentially concedes (Br. 28) that such intent could not be established based on contemporaneous events alone.

1. *The 1892 negotiations.* The record of the negotiations with the Yankton Sioux contains none of the sorts of

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[15] Congress responded by including penalties for the introduction of liquor "upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the [1858] treaty." Pet. App. 124.

statements by federal negotiators or tribal members that, in other cases, have been found to reflect a widely held understanding that a reservation was to be diminished. In *Rosebud Sioux*, for example, the Court noted the federal negotiator's statement to the Tribe that its cession of certain lands "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 591-592. Similarly, the Court noted in *Hagen* that the federal negotiator had informed the Tribe that "after next year there will be no outside boundary line to this reservation." 510 U.S. at 417. And in *DeCoteau*, the Court noted a tribal spokesman's acknowledgment that the reservation "was given us as a permanent home, but now we have decided to sell." 420 U.S. at 436-437 n.16.

No similar understanding that the Yankton Sioux Reservation was to be diminished can be discerned from the statements cited by petitioner. See Pet. Br. 29-30. Commissioner Cole's assertions that "[t]he reservation alone proclaims the old time and the old conditions," and that "[t]he tide of civilization * * * requires the sale of these surplus lands and the opening of this reservation to white settlement," are fully consistent with an intent to open surplus lands to non-Indian settlement within existing reservation boundaries. Commissioner Brown's statement that "[t]he time is past when you could stay in your present condition" likewise does not suggest any immediate extinguishment of the Reservation. He may simply have been expressing the view that the Tribe must have greater contact with non-Indian society in order to achieve the goal of self-sufficiency contemplated by the 1858 Treaty. Nor does the recognition by the commissioners and tribal members that the Agreement would effect a "sale" of surplus lands (see Pet. Br. 29) suggest any

understanding that the reservation boundaries would thereby be altered.

Other contemporaneous statements suggest, if anything, that the commissioners and the Tribe did *not* understand that the Reservation would be diminished. In their final report to the Secretary of the Interior, for example, the commissioners observed that the Agreement would bring about "[t]he settlement *of the reservation* by white people." J.A. 150 (emphasis added). And in a letter to one of the commissioners shortly after the Agreement was signed, Reverend Williamson, a missionary who was well-regarded among the Yankton Sioux, found "no cause of apprehension that this agreement will *in any way* interfere with the treaty of 1858." J.A. 317-318 (emphasis added).

2. *The congressional debates.* The congressional debates on the 1894 Act fail to demonstrate any intent to diminish the Reservation. The discussions focused primarily on the fiscal consequences of the government's agreeing to pay a sum certain for the surplus land at the outset rather than to pay only when, or if, the land was sold to settlers. See J.A. 406-427, 437-444. As Representative Pickler of South Dakota, a member of the Indian Affairs Committee and a supporter of the Agreement, stated during the House debates:

> The only question is whether we will settle up with the Indians now or keep books with them and pay them hereafter as the lands are sold, supposing they would so agree.

J.A. 427; see J.A. 432 (Rep. Maddox, an opponent of ratification, agrees that "[t]he question is whether we are willing to advance the money"). Nothing in the record indicates that Congress believed that the answer to that question would affect the future boundaries of the Reservation. See Pet. App. 15-16 ("the House debate" and

other contemporaneous statements "all show that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty").

Petitioner identifies no statement during the congressional debates that expressly addresses the status of the reservation boundaries. Instead, petitioner relies (Br. 31-32) on statements by two Representatives that the opened lands would become part of the "public domain." See J.A. 380, 386 (Reps. McRae and Hermann). However, isolated floor statements referring to the "public domain," especially when no such references appear in the text of the Act itself, shed little light on the diminishment question. See *Solem*, 465 U.S. at 475 & n.17; see also *Hagen*, 510 U.S. at 413.[16]

3. *The Presidential proclamation.* The post-enactment proclamation of the President opening the surplus lands for settlement also indicates that those lands were to remain within the Reservation. The proclamation refers to, and incorporates by reference, a "Schedule of Lands *within the Yankton Reservation*, South Dakota, to be opened to settlement by Proclamation of the President." J.A. 456 (emphasis added). The proclamation further states that the lands were being opened "under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in [the 1892] agreement." *Ibid.* Those "restrictions" and "reservations" necessarily included the Article XVIII savings provision preserving the "full force and effect" of the 1858 Treaty establishing the Reservation.

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[16] Moreover, another member of Congress expressed the view that the opened lands would "[n]ot necessarily" become a part of the "public domain" upon their purchase by the United States. J.A. 382-383 (statement of Rep. Lynch).

D. Subsequent Events Do Not Establish That The Reservation Was Diminished

The Court has recognized that evidence of the government's subsequent treatment of the lands opened by a surplus land act is of only limited value in assessing whether Congress intended to diminish a reservation. *Solem*, 465 U.S. at 471. It has never been found sufficient, in itself, to establish such an intent. Moreover, where the treatment of the opened lands has been "rife with contradictions and inconsistencies," such evidence is "of no help." *Id.* at 478; see also *Hagen*, 510 U.S. at 420.

The federal government's conduct with respect to the Yankton Sioux Reservation, while not entirely consistent, suggests that no diminishment was intended. Most significantly, on two occasions when the federal government squarely considered the question, it concluded that the Reservation was not diminished.

First, as early as 1913, in its brief in *Perrin* v. *United States*, 232 U.S. 478 (1914), the United States took the position that the Reservation had not been diminished. In arguing the validity of the liquor prohibition contained in Article XVII of the 1892 Agreement, the United States stated:

> And the "Reservation" referred to in Article I [of the Agreement] (as enduring then and after the passage of the act) was necessarily that embraced in the original boundaries of the 400,000 acres [under the 1858 Treaty].

U.S. Br. at 7-8, *Perrin* v. *United States*, No. 707 (O.T. 1913). In other words, the Reservation not only "endur[ed]" after the 1894 Act, but continued to encompass all of the lands within the 1858 Treaty boundaries. See also *id.* at 19-20 (describing ceded lands as within "actual physical boundaries of the reservation"). The petitioner

took the same position. See *Perrin* Transcript of Record at 28.

Second, in 1941, Felix Cohen, then-acting Solicitor of the Department of the Interior and author of the authoritative *Handbook of Federal Indian Law* (1942), issued a carefully considered opinion letter concluding that the boundaries of the Yankton Sioux Reservation had not been changed by the 1894 Act. See 1 U.S. Dep't of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 1063 (1979). His conclusion rested primarily on the fact that the 1894 Act, in contrast to other surplus land acts, provided for the allotment to tribal members of lands "scattered over all the reservation," rather than "ced[ing] a definite part of the reservation and treat[ing] the remaining area as a diminished reservation." *Id.* at 1064. Solicitor Cohen noted (*ibid.*) that events since the passage of the Act had not undermined his conclusion that the Reservation had not been diminished:

> Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468), and June 11, 1932 (47 Stat. 300).[17]

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[17] Petitioner argues (Br. 42-44) that Acting Solicitor Cohen's opinion is inconsistent with opinions issued by other members of the same office. Those opinions, however, either assume diminishment without analysis (see J.A. 492) or were issued by a subordinate officer, an associate solicitor (see J.A. 518). See *Hagen*, 510 U.S. at 420 (rejecting reliance on "merely passing references" to diminishment). The Cohen opinion has never been retracted or superseded. The official position of the Department of Interior remains that the Reservation was not diminished.

We do not dispute that Congress, the Executive, and the federal courts may not always have been consistent in their statements with respect to the status of the Yankton Sioux Reservation. Congress, for example, has occasionally used the term "former" in its post-1894 references to the Reservation. See Pet. Br. 44. More often, however, it has not.[18] While federal officials have sometimes made statements indicating that the Reservation was diminished (see Pet. Br. 41-44), those statements appear to be "merely passing references," and "not deliberate expres-

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Nor is there any inconsistency, as petitioner suggests (Br. 43), between Felix Cohen's 1941 opinion and his 1942 citation of *Perrin* for the proposition that Congress has the authority to impose "liquor restrictions on lands ceded to [the United States] by the Indians when these lands adjoined Indian country." *Handbook of Federal Indian Law* 353 & n.26. As explained on the next page of that treatise, Cohen was relying on a definition of "Indian country" as "all lands and reservations, Indian title to which has not been extinguished." *Id.* at 354 n.32. Under such a definition, tribal lands purchased by the United States or non-Indian settlers would no longer be Indian country, whether or not within an existing reservation.

[18] See, *e.g.*, Act of Feb. 26, 1896, ch. 31, § 1, 29 Stat. 16 (one-year leave of absence for "settlers who made settlement under the homestead laws upon lands in the Yankton Indian Reservation"); Act of June 10, 1896, ch. 398, § 1, 29 Stat. 343 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1068 (authorizing use of "land reserved for agency purposes on the Yankton Indian Reservation" as tribal park); Act of June 21, 1906, ch. 3504, 34 Stat. 371 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (restoration to Tribe of "lands on the Yankton Sioux Indian Reservation * * * now reserved for agency, schools, and other purposes"); Act of July 6, 1954, ch. 463, 68 Stat. 452 (preamble) (authorizing funds for removal and resettlement of "the Indians of the Yankton Indian Reservation" residing on lands taken for water project).

sions of * * * conclusions about congressional intent in [1894]." *Hagen*, 510 U.S. at 420.[19]

Similarly, the federal cases on which petitioner relies (Br. 33-34) neither turned on the diminishment question nor presented any extended analysis of that question. For example, while petitioner asserts (Br. 33) that the diminishment analysis in this case is "controlled" by *Perrin*, the Court had no occasion in that case to decide whether the reservation boundaries had been diminished. The case concerned whether Congress had exceeded its authority in prohibiting liquor sales on lands opened by the 1894 Act. 232 U.S. at 483. The Court concluded that it had not. *Id.* at 485. Accordingly, since the Court did not hold that Congress's authority to prohibit liquor was limited to

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[19] For example, petitioner notes (Br. 38, 44) the United States' statement 12 years ago in a footnote in a brief that, based on decisions of state courts in South Dakota, the Reservation had been diminished by the 1894 Act. See U.S. Br. at 17 n.10, *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc). The boundaries of the Reservation were, however, immaterial to the issue in that case, which instead concerned whether the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, abrogated the Tribe's rights to hunt bald or golden eagles. The court of appeals did not make any determinations regarding reservation boundaries, since the violations had occurred on trust lands, and left unresolved whether the conduct at issue had "occurred on the Yankton Sioux Reservation." 752 F.2d at 1270. Indeed, the defendant tribal members in *Dion* maintained that their conduct had occurred on the "Yankton Sioux Reservation," thereby asserting its continued existence. *Id.* at 1263.

Petitioner also points (Br. 44) to a Federal Register notice in which the Environmental Protection Agency expressed its "belie[f]" that "the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the Act of 1894." Yet, the very title of that notice—"Notice of *tentative* determination"— indicates that it should not be accorded significant weight. 59 Fed. Reg. 16,647, 16,649 (1994) (emphasis added). In any event, as petitioner acknowledges (Br. 44), EPA has since rejected that tentative belief.

Indian reservations, the Court did not have to decide whether the ceded lands were, in fact, within the Reservation. The Court's description of the ceded lands as "formerly included in the Yankton Sioux Indian Reservation" (*id.* at 480) is merely a "passing reference" that does not indicate any analysis of the diminishment issue. See *Hagen*, 510 U.S. at 420.[20]

To be sure, the State has asserted jurisdiction over the opened lands on the Reservation. See Pet. App. 33, 38. As this Court has recognized, however, such an assertion of jurisdiction, while of "some evidentiary value," is not dispositive of Congress's intent. *Solem*, 465 U.S. at 471. That is particularly so where, as here, there is countervailing evidence from Congress and the Executive Branch.[21]

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[20] The subsequent federal cases cited by petitioner (Br. 34, 38) merely assumed diminishment, without any independent assessment, and did not turn on the resolution of that question. See, *e.g.*, *Cihak* v. *United States*, 232 F. 551 (8th Cir. 1916) (dicta) (application of Article XVII); *Forman* v. *United States*, 256 F.2d 766 (8th Cir. 1958) (dicta) (allotment claim); *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159, 165 (Ct. Cl. 1980) (dicta) (land and trust fund claims related to 1894 Act); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980) (dicta) (dependent Indian community), cert. denied, 451 U.S. 941 (1981).

[21] Petitioner also cites (Br. 35-36) several opinions of the South Dakota Supreme Court that state that the Reservation was diminished. Some predate this Court's recent decisions clarifying the criteria for assessing diminishment. The rest simply rely, without further analysis, on the earlier opinions. See *State* v. *Williamson*, 211 N.W.2d 182, 183 (S.D. 1973) (analogizing 1892 Agreement to ordinary conveyance); *Wood* v. *Jameson*, 130 N.W.2d 95, 99 (S.D. 1964) (summarily holding that Reservation was diminished); *State* v. *Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) (citing *Williamson*); *State* v. *Thompson*, 355 N.W.2d 349, 350-351 (S.D. 1984) (citing *Williamson*); but see *Cournoyer* v. *Montana*, 512 N.W.2d 479, 479 (S.D. 1994) (referring to "physical confines of the Yankton Sioux Tribe reservation").

In sum, as the court of appeals observed, government entities' treatment of the Reservation has been "mixed." Pet. App. 35. At a minimum, then, one must conclude, as in *Solem*, that the evidence is too "rife with contradictions and inconsistencies" to establish that Congress intended to diminish the Reservation. 465 U.S. at 478.

E. Demographic Patterns Do Not Establish Diminishment

Petitioner relies (Br. 48-49) on demographic patterns as additional evidence of intent to diminish the Reservation. But "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act." *Solem*, 465 U.S. at 472. The Court has never held a reservation to have been diminished based on demographic factors alone.

To the extent that demographic evidence can shed any light on the intent of the Congress that adopted a surplus land act, the most probative evidence is from the years immediately after the adoption of the act. Here, such evidence is, as the court of appeals charitably put it, "somewhat incomplete." Pet. App. 41. The 1900 census did not separately identify the population within the boundaries of the Reservation as defined by the 1858 Treaty. It identified only the population of Charles Mix County, less than half of which falls within those boundaries. Those figures show that the County had 1,483 Indian residents and 7,015 non-Indian residents five years after the opening of the Reservation. Even assuming, as did the court of appeals, that the mix of Indians and non-Indians was the same throughout the County, Indians would still have constituted about 40 percent of the population within the original Reservation boundaries. *Ibid.*[22] This is not the

[22] It is reasonable to assume that most Indians lived on the Reservation in 1900, rather than elsewhere in the County. Indeed, at the

sort of situation described in *Hagen* and *Solem*—"an area [that] is predominately populated by non-Indians with only a few surviving pockets of Indian allotments"—that would be probative of congressional intent to diminish a reservation. *Hagen*, 510 U.S. at 420-421; *Solem*, 465 U.S. at 471-472.

Even today, "between 32 and 44 percent of the people within the 1858 boundaries are Indians," depending on whether one uses 1990 census figures or the Tribe's own figures. Pet. App. 42. That is a significantly higher percentage than on the Lake Traverse Reservation, which the Court held to have been disestablished in *DeCoteau*, where Indians constituted only 9 percent of the population. See 420 U.S. at 428. And it is more than twice the percentage of Indians within the original reservation boundaries in *Hagen*. See 510 U.S. at 421. In short, the territory within the boundaries of the Yankton Sioux Reservation has not lost its "Indian character."

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time of the 1990 census, only eight of the 1,994 Indians in the County lived outside the Reservation. Pet. App. 42-43.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1997

Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182).

[13] ORAL ARGUMENT OF
HARRY R. SACHSE ON BEHALF OF THE
PETITIONER AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

The United States agrees with the position taken by Mr. Sclar and by the petitioner in this case. What I want to try to do is put this 1892 Act into a little bit of historical perspective.

As Mr. Sclar said, the Yuroks always lived in this area. Twice they had their reservation recognized by Executive Order, 1855 and 1891. The 1891 Act was an obvious reaction to the legal problems that had been recognized in the 1889 Court of Appeals case.

In 1892 it may be that the House of Representatives set out to take from these Indians much of what had been theirs. But what the House set out to do, the Senate corrected. And there is a very marked contrast between the Act that was finally passed and the Act that was introduced in the House. The Act as it was finally passed in our view is quite clearly a special allotment Act similar to a number of other allotment Acts that were passed in that general time and which did not terminate the reservation in question.

I would like to first mention something about the [14] General Allotment Act. I think that's important in this. By the 1880's most of the Indian reservations had been created. But there was a pressure by the settlers around those reservations to get some of the land in the reservatons. They felt the Indians were not utilizing that land. And on the other hand there was a pressure to keep faith with the Indians and not to take from them what had

recently been given to them. A sort of compromise was worked out in the General Allotment Act of 1887 called the Dawes Act. It has subsequently been repudiated in the Indian Reorganization Act of 1934. The Dawes Act set up this system, that whenever the President thought it was wise to do so, he could require all the Indians within a reservation to take allotments of a particular number of acres each. This would usually leave considerable land in the reservation that was not allotted. The President then with the consent of the Indians, which it was assumed in those days he could obtain, would open the rest of the reservation for homesteading, but the fees charged to the homesteaders would be used for the benefit of the Indians who lived on the reservation.

Now, that was the General Allotment Act. The General Allotment Act did not require the President to open any particular reservation in this way. And Congress passed a number of special allotment Acts. We have listed those that have been in litigation on page 22 of our brief, Footnote 18. [15] These special allotment Acts would take the matter out of the hands of the President and tribe and Congress would say, "We want allotments made on a particular piece of land. We want, once the allotments are made, we want to open the rest of it to settlement, and we want funds collected from the settlers to be administered by the Government for the benefit of the Indians that lived on that land."

Many of the special allotment Acts made particular reference to the General Allotment Act saying that the allotments would be made under the terms of the General Allotment Act.

It's very significant that the funds obtained in such an Act were to be used for the benefit of the Indians who remained in the reservation. And this meant, of course, a continued Federal involvement with that reservation, both in handling the land transactions and in administering the funds that would be created by this procedure.

In our view, the 1892 Klamath River Act is that kind of special allotment Act. In our brief when we cited the language of the Act, we put in dark provisions, the part added by the Senate, which together with the final paragraph that had been there all along make this Act exactly a special allotment Act of the area of that reservation that was affected.

QUESTION: Ultimately homesteaders' land would be [16] within the reservation?

MR. SACHSE: That's correct.

Now, this Court early—

QUESTION: Would you take the same position even if some was allotted, some was homesteaded and the people and all the restrictions on the allotments had expired and the allotted lands had been sold to whites?

MR. SACHSE: Unless Congress had in some—we don't reach that issue here because there still is allotted restricted land in this reservation.

QUESTION: Well, let me ask you. In an Indian reservation that's along a river, who owns the bed of the river?

MR. SACHSE: Well, in this case, this Court in *Donnelly* has already held that the Indians own the bed of that river. It has never been taken from them.

QUESTION: And that has never been allotted to anybody, has it?

MR. SACHSE: It has never been allotted to anybody. That's still communely held Indian land as far as we are concerned, and there is not a word in the 1892 Act—

QUESTION: Whether the reservation exists or whether it doesn't, and regardless of who owns the river bed, is there some treaty or some law defining Indian fishing rights? Or is it just ancestral fishing rights that have been—

[17] MR. SACHSE: It's somewhere between the two. There were ancestral fishing rights, but this Court in *Donnelly* held specifically that the 1891 Extension that ran

snaking 40 miles down the river was done specifically to preserve the fishing rights that the Indians had.

QUESTION: Which were what?

MR. SACHSE: I think the exclusive rights to fish in that river.

QUESTION: The exclusive right to fish there?

MR. SACHSE: Since it was made an Indian reservation, the purpose of which is that this area is to be reserved for the Indians, and since surplus lands were sold but nothing was done—

QUESTION: You would say, then, I suppose, that since the Indians owned then and still own the bed of the river, that even if all of the riparian land was in other ownership, the Indians would have the exclusive right to fish in the river?

MR. SACHSE: I would say—yes, I would say that. But I don't think this case requires us—

QUESTION: Don't you have to hold that? Because there is some river riparian land that is not owned by the Indians.

MR. SACHSE: Well, here is the way I would analyze this case, but I think what you have raised is also a possible [18] analysis, a possible way to handle the case.

The 1891 Act established an Indian reservation, a mile on both sides of the river including the river and going all the way down to the sea. This Court in *Donnally* held that one of the primary purposes of establishing that reservation was to secure to the Indians fishing rights of that river. That reservation has never been abolished. The 1892 Act which let other people than Indians settle in this area while preserving also Indian settlement, simply did not abolish the reservation. So the reservation is still an area of Federal jurisdiction and protection, except to the extent that Public Law 280 has given the State of California certain criminal and civil jurisdictions in it. Public Law 280 specifically reserves federally granted fishing rights and these were granted by Executive Order as this Court held in *Donnelly*.

QUESTION: That still leaves the question of what—you said "exclusive."

MR. SACHSE: No. Let me say this. The issue was not argued below as to exactly what the consequences of this being held to be an Indian reservation. The court went up on the question it was not a reservation.

QUESTION: The scope of the Indian rights and whether or not the kind of fishing the Indians now want to do is the kind of a fishing right that was historically exercised has not been settled.

[19] MR. SACHSE: That is correct. And we have only asked this Cout to determine the question of whether this remains Indian country, whether this remains an Indian reservation, with a remand after that has been determined to the California courts.

QUESTION: You think that it may be irrelevant whether the reservation exists or not if it's true that the Indians still own the bed of the river.

MR. SACHSE: I don't think it would be irrelevant. I think it would matter from the standpoint of criminal and civil jurisdiction. It would only be irrelevant if the Court were to find that Public Law 280 had granted such total jurisdiction to the State of California that even if it is a reservation all that is left is the ownership of the river. So I think it still is relevant.

I would like to get back to the specific point that this Court is faced with, and that is has this allotment process terminated the reservation. And because I am running out of time, I would just mention this very quickly. That in *United States v. Celestine*, the Court first had to determine this problem, 215 U.S. And in that case the Court held in a careful opinion that the General Allotment Act is inconsistent with termination of a reservation, that allotments under that Act and even disposal of lands to non-Indians does not terminate a reservation. In *United States v. Nice* at 241 U.S.—these [20] are all in our brief—the Court held that a special allotment Act should be interpreted in accordance with, policy in the

General Allotment Act and that a special allotment Act on the Sioux reservation though it required the Sioux to take, on that reservation, allotments, required the President to dispose of the extra land, did not terminate Federal jurisdiction, did not terminate the reservation, did not terminate Federal jurisdiction even as to the land that was disposed of to non-Indians.

This same policy is recognized more recently by this Court in *Seymour v. Superintendent* and also has been codified by Congress in its definition of Indian country as including all the land within the boundaries of an Indian reservation whether patented or allotted or not.

There have been two very recent cases we mention in our brief also, one in the Eighth Circuit, *City of New Town*, and another in the Supreme Court of South Dakota, *State v. Molash*, that had this same consistent interpretation of special allotments Acts indistinguishable from the 1892 Klamath River Act.

In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation. "The Smith River Reservation is hereby discontinued," Congress said. Or. "The reservation lines [21] of the Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished." There has been no confusion between an Act that simply opens the reservation to allotment and settlement and one that abolishes the boundaries of a reservation.

Thank you.

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Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148).

[9] ORAL ARGUMENT OF
HARRY SACHSE, ESQ., FOR THE
UNITED STATES AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

I want to say a word first about any Indian reservation, before talking about this one, because it seems to me that the discussion so far has been a bit confusing about that.

In almost every Indian reservation in the country there's land that has been allotted to Indians, there's land that has been sold in fee simple to people who are not Indians. There's often a large non-Indian population inside an Indian reservation.

One of the characteristics of this reservation is that there's such a large Indian population inside, and that there's a going tribe, with an organized government and an agency of the BIA, and a very alive and viable situation.

Basically, and without trying to get into all of the details of it, the State in which an Indian reservation is [10] situated has full jurisdiction over non-Indians who live inside an Indian reservation, both civil and criminal jurisdiction. This Court held so in a number of cases, starting in the Nineteenth Century with *McBratney* and *Draper* which were criminal cases. And Justice Frankfurter laid this out in a good deal of detail in *Cake vs. Egan* and the *Metlacotla* cases in about 380—

QUESTION: Is that civil as well as criminal?

MR. SACHSE: Civil as well as criminal.

QUESTION: *Cake v. Egan*—

QUESTION: Irrespective of whether they live on allotted lands?

MR. SACHSE: Irrespective of where they live within the—

QUESTION: But in present actions with an Indian, they're going to be subject to federal law.

MR. SACHSE: Correct. If the transaction is with an Indian or affects the vital interests of the tribe, they're going to be subject to federal law. The exact extent of that is the kind of thing that's still debated before you, in a case such as the *Maserie* case that's under advisement.

QUESTION: And it may be debated eventually in this case, I take it?

MR. SACHSE: And may eventually be debated here.

Now, I think I need to review some law concerning [11] this Treaty as well as—this reservation, as well as the facts.

First, briefly to the facts:

A permanent reservation was established by Treaty in 1867, with surveyed boundaries. And it's this reservation, which is much smaller than the land the Indians had previously had. They had already had their big loss of land, and this was what was left to them, after great amounts of land had been taken away from them.

Then, by an agreement in 1889, made specifically under the General Allotment Act; and at a time when the Indians were in great distress, that the moneys owed to them by the federal government had not been paid to them, it was the middle of winter.

The federal government negotiated with the tribe to do what's known as open its reservation. That is, to allow the sale of surplus land within the reservation. And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the General Allotment Act. There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation.

You've heard some talk about the public domain. What's important in this Act is there is no language saying [12] that this was returned to the public domain.

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no specific area ceded, what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded,—

QUESTION: Yes?

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective.

[13] But the Indians were paid for the land. How were they paid for it? It was put in the Treasury of the United States, to be used for their benefit. In other words, it's a bookkeeping entry from one government place to another. The money—the Indian Agency was maintained, the money was appropriated by the government as needed for the Indians. The land was opened for homesteading but only for homesteading, not for any purpose.

You have the exact same actual dynamics that occurred in the south half of the Colville Reservation, which this Court held in *Seymour v. Superintendent*, did not abolish that reservation.

The same dynamic that was done in *Mattz v. Arnett*, as to that reservation; namely, the non-Indians got what they wanted, the Indians got what they could. The non-Indians got the right to settle that land. The Indians got the money from the settlement of that land, which was small enough.

The question remaining is: What happened to the federal jurisdiction? What happened to the jurisdiction of the tribe?

And I want to approach that problem now.

QUESTION: Would it be fair to say that the United States in those transactions was acting as the broker for the Indians, to announce publicly that settlers could come in and buy it for $2.50 an acre?

[14] MR. SACHSE: It's exactly so, and we quote in our brief where one of the Senators objected to the cession idea, to the fact that the government would pay the money immediately.

And one of the other Senators explained to him, said: This doesn't mean anything, because this is just a book-keeping transaction in the Treasury. We get right back the money that we're going to pay to the Indians, as we sell off the land.

Now, in some later Acts, the government decided to do it the other way, to not pay the Indians at first, to only pay the Indians as the land was sold.

But the practical effect of both kinds of Acts is identical, that the Indians kept, lived on the allotted land, the unallotted and was opened up for homesteading, because it was thought in this—this was said to the Indians in the negotiations, and the Court talked about this in *Mattz*—this Court talked about this in *Mattz vs. Arnett*.

The excuse for doing this kind of thing was that it was for the benefit of the Indians to do it, that it was better

for them to live next to a high caliber of citizen who would be farming his land, and so forth. That's the kind of language that was used.

And that was the same whether the Indians said they ceded it first, or said—or the government acted as agent, disposing of it.

And, by the way, this language "cession" in the *Ash* [15] *Sheep* case, which we discuss in our brief, is used in connection with an arrangement where the government only acted purely as agent, where they simply—whenever someone wanted a piece of the land, would sell it to him then, and give the money to the Indians. The word "cede" was used.

But obviously with no technical—

QUESTION: What impact, if anything, did the cession have, followed by the sale for homesteading or the settlement for homesteading? What happened as a consequence, or what was the impact with respect to the jurisdiction of the State, if anything?

MR. SACHSE: Of the State? None. None.

The cession of the land or the selling in fee simple of land inside an Indian reservation, say, as in the reservation in *Mattz*—in *Seymour vs. Superintendent*, the south half of the Colville. That then is land owned by a non-Indian inside an Indian reservation.

QUESTION: Well, yes, but you would apparently think the State has civil and criminal jurisdiction over non-Indians on that.

MR. SACHSE: Clearly.

QUESTION: How about the State's trespass law?

MR. SACHSE: The State's—the State's trespass law would clearly apply to non-Indians, but that would be—to the extent that it is applying—

[16] QUESTION: Well, how about to the owner—how about the owner of the deeded land, the ceded land, he now has a fee simple title to it—

MR. SACHSE: Okay.

QUESTION: —and he wants to keep people off his land, and he does it in the name of the State's trespass law. May he do so?

MR. SACHSE: I don't think he could keep an Indian from—

QUESTION: Really?

MR. SACHSE: It seems to me that inside an Indian reservation—

QUESTION: Well, let me talk to them about—

MR. SACHSE: Yes?

QUESTION: —a non-Indian. Can he keep a non-Indian off in the name of the State's trespass law?

MR. SACHSE: Clearly, yes.

QUESTION: So the State's law does apply there.

MR. SACHSE: What I'm saying is that in a transaction between an Indian and a non-Indian—

QUESTION: Well, I didn't ask you about transaction, Mr. Sachse, I asked you about the State's trespass law.

Does the State—after the land is deeded, does the State's trespass law apply to that land?

Certainly it doesn't—

[17] MR. SACHSE: It applies to that land as to non-Indians but not as to Indians.

QUESTION: So an Indian—

MR. SACHSE: The State's criminal law does not apply to Indians inside an Indian reservation.

QUESTION: And so it just—so the State sovereignty just doesn't apply to that land, no matter who it's owned by, as far as keeping an Indian off of it is concerned?

Is that your thesis?

MR. SACHSE: I think that's correct. That would be under federal law or under tribal law, if it's a matter affecting an Indian inside an Indian reservation.

Now, the General Allotment Act left a lot of questions unresolved. And the early questions that were unresolved was whether a reservation existed at all after there had been allotments, and whether even allotted land was Indian land under federal jurisdiction.

And the Court first addressed that question in 1909, in *U.S. v. Celestine,* in which it held that even though land had been allotted to an Indian and patented to the Indian, that the land remained inside the Indian reservation, that no land was removed from an Indian reservation until it specifically removed by Congress from the reservation.

That proposition was extended in 1916, in *United* [18] v. *Nice* which held that the tribal relations of the Indians continues and that federal liquor laws would apply to Indians anywhere within the reservation. But, the important thing was this, that the States were claiming, just as the State claims here, that opening a reservation and alloting lands to Indian meant that federal jurisdiction and tribal jurisdiction would only apply on the allotted lands. This creates several problems, one's the obvious one of having to check plat books to see whose jurisdiction applies where, the other one's even a bit more complicated, these red dots move around, the Tribe buys new land, land can be consolidated. As under a recent act of Congress, this Tribe has an active program of purchasing new land which Congress described as within the reservation. Thereby, again recognizing that the reservation still existed.

QUESTION: Must have been the situation for a good many years?

ANSWER: Thats right.

QUESTION: Hasn't been a great deal of trouble about it, has there?

ANSWER: Well, I think there has. What has really occured is that there has been no law and order on a lot [19]of Indian reservations. And part of the problem has been that the federal government hasn't done its job, the State hasn't done their job, and the tribes have been too weak to do anything.

QUESTION: Well, what is the State's job? What does this State—on an Indian reservation?

MR. SACHSE: In this—in a reservation—

QUESTION: On an Indian reservation, what is the State's responsibility, if any?

MR. SACHSE: The State's responsibility in an Indian reservation is as to non-Indians, to maintain law and order in matters between non-Indians. The federal government and the tribe have responsibility of maintaining law and order in matters that affect Indians.

And neither one of them should have to look at the plat book to do it. It's a question of whether the person is Indian or non-Indian. That's a difficult enough problem, without having to figure out whether a policeman can go on this piece of ground or that piece of ground.

QUESTION: Does a non-Indian ever get in conflict with an Indian?

MR. SACHSE: Yes, and when that happens, that's federal jurisdiction, under 18 U.S.C. 1151. And it makes a good deal of sense for the federal—

QUESTION: Is that generally or is—that's true [20] if it's on a reservation.

MR. SACHSE: If it's on a reservation, that's right.

QUESTION: But not otherwise.

MR. SACHSE: If it's off the reservation, it would —it would not, that's right; it would be State jurisdiction.

QUESTION: In a civil dispute—

MR. SACHSE: No. Excuse me, that's inaccurate. If it's not on Indian country, it would be State jurisdiction. There could be Indian country off a reservation.

QUESTION: Well, yes. Patented land is Indian country by statutory definition; correct?

MR. SACHSE: That's right.

QUESTION: In a civil dispute, under *Williams v. Lee*, isn't a federal question, it's a question for the tribal court, if it's on a reservation.

MR. SACHSE: That's correct. That within an Indian reservation, in a matter affecting Indians, the jurisdiction —the original jurisdiction, the root of the jurisdiction was tribal jurisdiction. But the federal government, through

numerous statutes, has preempted great parts of that jurisdiction. And for all major crimes, for instance, there's federal jurisdiction. But in a civil dispute between an Indian and a non-Indian on an Indian reservation, it's tribal jurisdiction.

That's *Williams vs. Lee.*

[21] QUESTION: Laying aside the major crimes question, and you had a very simple statement that I understood thoroughly for a moment or two there—when you said it desn't depend on geography or plats, it depends on the racial origin.

Now, were you confining that to reservations, as you suggested first, or to Indian country?

MR. SACHSE: I'm—that is true in Indian country. But if you—Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent,* and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.

QUESTION: Yes, but go ahead. If the Court should hold—

MR. SACHSE: If the Court should hold that, then each one of these red spots is a little island of federal and tribal jurisdiction, and we're not in a time now when these—

QUESTION: That's the way it's been, isn't it, as my brother White suggested?

MR. SACHSE: The way it's been is that everyone has ignored both the Indian and federal rights there, and this—[22] I don't want to testify, but I don't think the Court should assume that the situation has been good, and that you can assume that because we haven't faced this issue before that it's perfectly all right to leave it another fifty years.

QUESTION: On the other hand, if the Court should decide that the statute, the cession statute didn't amount to a conveyance,—

MR. SACHSE: Yeah.

QUESTION: —then the result would be that the State would no longer have any power to enforce its laws in any of these several counties, if any Indian was involved.

MR. SACHSE: That's correct. It would be a federal question, as in any other Indian reservation,—

QUESTION: Wherever it occurred.

MR. SACHSE: —wherever it occurred, and this is something that Congress has decided is a proper way for the federal government to exercise its—

QUESTION: Well, if this is an Indian reservation.

MR. SACHSE: Yes. And whether this one is or not, it would be the same situation you're describing in other reservations of the State, that clearly are reservations.

We're speaking of the proposition that this, what we call a reservation, where a major tribe lives and where there's a major number of Indians, should be treated like the other Indian reservations in the State.

[23] QUESTION: Well, I suppose the vast proportion —this is something like, what, 27,000 non-Indians and a few, 3,000-plus Indians?

MR. SACHSE: That's right.

QUESTION: In this Lake Traverse area.

MR. SACHSE: That's correct.

But we're not trying to subject the non-Indians to federal or Indian jurisdiction except to the extent needed to fulfill the trust responsibilities—

QUESTION: Which means that whenever they're involved with an Indian—

MR. SACHSE: That's right.

QUESTION: —the State does not have any jurisdiction—

MR. SACHSE: That's correct.

QUESTION: —with respect to its civil, criminal or family or status law.

QUESTION: It was suggested that the tribe had recently passed an ordinance that asserted rather expansive jurisdiction within this area. Is that true or not?

Or do you know?

MR. SACHSE: I haven't seen it. I've heard that that's so. I suspect that it goes beyond the authority that the tribe has.

QUESTION: Because it reaches non-Indians?

[24] MR. SACHSE: Yes.

QUESTION: Well, how do we know that the tribe doesn't have authority to reach non-Indians?

MR. SACHSE: Well, the *McBratney* case and the *Draper* case in criminal matters.

QUESTION: Well, all *McBratney* says is that the State has the right to try a white man for a crime that took place on an Indian reservation. It doesn't say the tribe couldn't try him.

MR. SACHSE: Well, I suppose I just have to answer that this has been the—at least tacit holding of this Court, or assumption of the Court in a number of cases. And I refer to *Cake v. Egan,* where Justice Frankfurter tried to lay out the limits on tribal jurisdiction. And it's never been faced directly in the last ten years, perhaps, by this Court, but it has been faced before.

QUESTION: Well,—

MR. SACHSE: My time is up, and I'm feeling bad about taking all the time of my partner.

MR. CHIEF JUSTICE BURGER: We'll take care of that; you're on our time for a minute or two here.

Mr. Justice White, did you have a further question?

QUESTION: No, I didn't.

MR. CHIEF JUSTICE BURGER: We'll hear from your friend, then.

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562).

* * * *

[18] ORAL ARGUMENT OF H. BARTOW FARR, ESQ. ON BEHALF OF U. S. AS *AMICUS CURIAE*

QUESTION: Mr. Farr, before you commence, will you help me understand the facts situation?

The main issue, as I understand it, is the boundary of the Reservation.

MR. FARR: That is right.

QUESTION: The location of the boundary. Who occupies the land within the disputed area? Do Indians still occupy part of it?

MR. FARR: There are Indians within the disputed area but I think the area is largely occupied by whites who purchased or successors of the people who purchased the open lands.

QUESTION: Right. And the principal interest of the Indian Tribe, as I understand it, is whether the Tribe or the state exercises jurisdiction within the disputed area.

MR. FARR: The Tribe and the Federal Government or [19] the state, yes.

QUESTION: Right. Well, who, in fact, has exercised jurisdiction legally? What laws have prevailed within the disputed area in recent years? How far back?

MR. FARR: Well, this is a question which I think the record is unclear on, Mr. Justice Powell. Essentially, the United States, as the United States understands the position—of course, not having been the party to the suit throughout, there has been some exercise of jurisdiction by the state, they having taken the position that this is land outside of an Indian Reservation to which their jurisdiction applies.

QUESTION: Have state criminal laws been imposed or enforced within the disputed area?

MR. FARR: I believe that the state has, you know, gone ahead and imposed state criminal law as well as,

though, I think the Federal Government and the U.S. Attorneys have also imposed some federal law but there has basically been a kind of working relationship in this area.

I am not sure how much of this is reflected by the record but I think as a practical matter that is generally what has been happening.

QUESTION: All right. Just one other question. We are not concerned with the individual title of any particular parcel of land, are we?

[20] MR. FARR: We are not.

QUESTION: Just the boundary of the reservation.

MR. FARR: That is right.

QUESTION: Right.

MR. FARR: Mr. Chief Justice and may it please the Court:

The United States is appearing this afternoon as *amicus curiae* is support of the position of the Rosebud Sioux Tribe that the decision of the Court of Appeals for the Eighth Circuit should be reversed.

We think that under the principles set forth by this Court in previous cases, particularly in *Seymour, Mattz* and *DeCoteau*, that it is clear that the acts of 1904, 1907 and 1910 did not disestablish the boundaries of the Rosebud Sioux Reservation in the areas to which they applied.

I would like to note briefly at the outset one important general point. In suggesting that Congress did not disestablish the boundaries of the Reservation in the early 1900's, we do not mean to imply that Congress expected that those boundaries and the boundaries of comparable reservations were going to continue indefinitely.

We agree that in the early 1900's, Congress contemplated at some period of time that the Reservation system would, in fact, come to an end but we believe that time was when the trust period on Indian allotments expired and the [21] assimilation of Indians and white settlers on the lands had been accomplished.

QUESTION: And in your view, it would have taken an Act of Congress later, then, to—

MR. FARR: That is corect. Congress at some point would have found that the assimilation had occurred and would have passed an Act abolishing the Reservation.

At that point, all of these lands and all of the people on it—except if the Federal Government wished to retain jurisdiction over the Indians—would have gone within state jurisdiction.

In 1934, however, as the Court is aware, Congress reversed that policy when it passed the Indian Reorganization Act and definitely extended the trust period on the Indian allotment.

I will discuss that more briefly in connection with the General Allotment Act of 1887.

Because this case involves an issue of statutory interpretation, the United States does not urge or perhaps even believe it is possible for this Court to lay down a binding fixed rule that would govern construction of acts in all similar cases.

However, we do believe it is appropriate for this Court to reaffirm the principle that except for the language of an act or the compelling legislative history, shows a clear [22] intention by Congress to contract Reservation boundaries and limit federal jurisdiction over certain areas of Indian reservations, that whenever Congress without a binding agreement opens lands to white settlers, it does not pay for them and does not guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does not remove the lands from the boundaries of the Reservation.

As this Court said in *Seymour*, discussing an act with very, very similar terms, the purpose of the 1905 Act is neither to destroy the existence of the Reservation nor to lessen federal responsibility or jurisdiction over the Indians having tribal rights on that Reservation.

Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government

has made up out of whole cloth. It is supported both by history and by the previous decisions of this Court.

To begin with, it is well-recognized that the Tribes are entitled to rely on certain rules of statutory construction. In particular, doubtful expressions are to be resolved for the benefit of the Indian.

More particularly, in cases of these types—of this type, the intent to disestablish Reservation boundaries must be made clear, either from the Act or the legislative [23] history and as this Court said in *Rice versus Olson*, the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history. All of these rules of construction apply to the case at hand.

Equally important—

QUESTION: Mr. Farr, may I interrupt you?

MR. FARR: Certainly.

QUESTION: As I understand the geography, we really are not talking about very many Indians because all of the unsold land has been restored to the Indians and all the land which was sold was sold to whites. Isn't that right?

MR. FARR: Well, those facts are true, yes. But in terms of the area in which we are talking about, we are talking about a considerable area of land in which Indians will either be able to move within federal jurisdiction or will be moving within the state jurisdiction and of course, Indians do have allotments within those open areas.

QUESTION: Within the open areas.

MR. FARR: Yes. They do.

QUESTION: But could you clarify one thing? What percentage of the—what portion of this total land was restored in 1934? How much of the original reservation is in dispute?

MR. FARR: I would love to answer that question but I have no idea.

[24] QUESTION: The record does not tell us, I take it.

MR. FARR: No.

QUESTION: But these would be probably noncontiguous parcels, wouldn't they? The would be little islands.

MR. FARR: They are likely to be, right. I mean, depending on the settlement practices and who defaulted and who did not, the lands that would be left available would be likely to be individual tracts. That is correct.

QUESTION: One more last question. Does the record tell us how many Indians live on the lands in dispute?

MR. FARR: I believe that there is a figure stated in one of the opinions below that—I think that the Reservation covers about 7,000. I think that the areas that we are talking about, the counties that we are talking about, the number of Indians is somewhere around 1,600 or 1,700. I think that is reflected in the record.

QUESTION: I see. And those would be Indians that reacquired lands or now occupy lands which were originally—

MR. FARR: Well, not necessarily. Again, they may be Indians who were allotted lands at the time that these areas were opened. When the areas were opened, Indians were first given an opportunity to select allotments within those areas.

QUESTION: Well, wouldn't, by virtue of those allotments, wouldn't that land be Indian country?

MR. FARR: That land is Indian country.

[25] QUESTION: There is no dispute about that.

MR. FARR: No, I don't believe so.

QUESTION: How many Indians occupy land over which there is a dispute? Do we know that?

MR. FARR: I do not know.

QUESTION: And there would be very few, would there not?

MR. FARR: Well, I don't know how many there would be, but I think—I might just say that the principle, I think, extends further than that because jurisdiction, if it only applies on allotments, the Indians, any time they

step off their particular allotments onto territory that is owned by a white settler may at that point be subject to state jurisdiction and that is something that clearly the Indians do not want and which is an interest we feel that we ought to protect in this case.

Turning to the General Allotment Act of 1887 briefly—

QUESTION: In other words, the nonreservation land can be and is Indian country if it is owned by the individual Indians.

MR. FARR: That is correct. That applies in—

QUESTION: And by the same token, or the other side of the same coin, within a Reservation there can be fee simple and non-Indians.

MR. FARR: Well, there can be fee simple and [26] non-Indians in terms of land ownership.

QUESTION: That is what I mean.

MR. FARR: No question. However, for purposes of jurisdiction—

QUESTION: Well, we are talking now about the geographic boundaries of the Reservation.

MR. FARR: That is correct. Now, the definition of Indian country, just to make sure that I have answered your question properly, the definition of Indian country in 1151 includes all areas including patented lands within a Reservation within Indian country and also, Indian allotments outside the boundaries of a Reservation within Indian country.

QUESTION: So within a Reservation, land owned in fee simple by non-Indians is still Indian country.

MR. FARR: That is correct.

QUESTION: Do you know what the relative proportion of whites and Indians is in the area that is disputed?

MR. FARR: If my memory serves me correctly, Mr. Justice White, I think there are somewhere around 16,000 whites and 1,600 Indians.

QUESTION: 16,000 whites and 1,600 Indians.

MR. FARR: I believe that is correct.

We also believe, in addition to the presumptions that I discussed a minute ago, that the General Allotment Act of 1887 has—that the policies and objectives of that are [27] consistent with the principle that an act such as this does not disestablish Reservation boundaries.

Although Respondents in their brief have continually turned the General Allotment Act on its head saying that it embodies the intent of Congress to disestablish Reservations, this Court has considered that precise question in several recent cases and found the opposite intent and we believe the Court correctly identified the intent of the General Allotment Act only last term in *Moe versus Confederated Salish and Kootenai Tribes,* in which you quoted from *Mattz* with approval the following language:

"Its policy, that of the General Allotment Act of 1887, was to continue the Reservation system and the trust status of Indian lands but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the Reservation could be abolished." And that is the Act of Congress that I said in answer to your question, Mr. Justice Rehnquist.

Unalloted lands were made available to non-Indians with a purpose in part of promoting interaction between the races and of encouraging Indians to adopt white ways.

QUESTION: When was that Act?

MR. FARR: That is 1887.

QUESTION: '87.

MR. FARR: Right.

[28] And in fact, Respondents have said that this Sioux Act, in fact, followed along from that general plan.

We think that that indicates that the Court has recognized an intent to retain jurisdiction and control over those lands during the trust period with the consideration of whether to end the Reservation to be made at a later time when the assimilation had occurred and we think the Court has noted that even more specifically in the cases in

which we very heavily rely on in our brief. *Seymour* and *Mattz* and also in *DeCouteau*, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed.

In addition to these guiding principles, we also feel that the legislative history and the administrative treatment that we have set forth in our brief supports the position of the Tribe.

The remaining question then is, what is there sufficient to override this in the materials that the Court has before it?

Most importantly we call the Court's attention to the fact that there is nothing in the Act that says specifically that jurisdiction over these areas was to be given to the state.

In fact, I think, as a reading of the legislative history shows, Congress was really not concerned with the [29] jurisdiction at this point. The pressure on Congress was to open up lands for white settlers for two reasons, one, the settlers wanted the lands and two, the counties wanted a greater tax base.

Both of those objectives could be met perfectly comfortably by Congress by opening lands within the Reservation boundaries without sacrificing the principles of the General Allotment Act of 1887 which was to continue the Reservation during the period of assimilation.

QUESTION: Well, could the counties tax white-owned lands within the Reservation?

MR. FARR: Yes.

I don't believe that there is any dispute about that, but that was considered at that time and I believe, even now, would be considered land that is within the power of the state to tax.

In *DeCoteau*, in fact, discussing the—this particular conflict of policy the Court said, in 1887, the General Allotment Act was enacted in an attempt to reconcile the government's responsibility for the Indians' welfare with the

desire of non-Indians to settle upon Reservation land and we submit in this case that the best way to reconcile those and the way that Congress did reconcile them throughout this period was to continue the Reservation system but open white lands so that they would have a taxable base for the county and [30] the whites would have the additional lands.

For those reasons, as my time is getting short, I will close and simply suggest that the decision of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Farr.

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Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 96-6281).

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[18]

ORAL ARGUMENT OF RONALD J. MANN
ON BEHALF OF THE UNITED STATES AS
AMICUS CURIAE SUPPORTING THE PETITIONER

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

The question before the Court is whether the provisions of the 1902 and 1905 acts that opened portions of the Uintah Indian Reservation to settlement by non-Indians operated to exclude from the reservation the lands that were opened to settlement.

QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation boundary be excluded, in your view? Was that language clear enough under the Seymour case, and DeCoteau, and some of the others?

MR. MANN: We think it's quite clear that the language would not have been sufficient to alter the boundaries of the reservation. The Court's decision—

QUESTION: How do you explain away Seymour and the other cases indicating that that language is [19] sufficient?

MR. MANN: I don't think that those cases do indicate that the language is sufficient. If I could sort of take you through the cases where this Court has referred to public domain language in statutes affecting reservations, the statute at issue in Seymour actually had also been considered by the Court in an earlier case, United States v. Pelican in 1914, but in both cases the key thing to realize is that the statute does not simply say that the land is being restored to the public domain. It states that the reservation is being vacated and restored to the public domain. Now, the word vacate in our mind carries much

more of a connotation of surrender, or cession of the type that has been required in this Court's later decisions, so that doesn't really seem to us to speak to this issue directly.

QUESTION: I would think that that phrase hurts your case rather than helps it. It shows that restored to the public domain means being taken away from the reservation.

MR. MANN: Well, no, actually—

QUESTION: Being vacated and restored to the public domain. It doesn't mean merely that white settlers are going to be allowed to come in. It means it's off the reservation from now on.

[20] MR. MANN: Well, it suggests that the reservation is being vacated, and there are a number of things that can happen when the reservation is vacated. In this particular instance, the land is being restored to the public domain.

I think that the clearest description—

QUESTION: What does that mean, though, and restored to the public domain? What do you think it means in that context?

MR. MANN: Well, the clearest explanation the Court has given in this context is in footnote 17 of the opinion in Solem, where the Court indicated that the phrase could well have referred to the fact that the lands were being made available for sale to non-Indians.

The reference to public lands in Federal statutes has traditionally referred to lands that are available for sale as opposed to lands owned by the United States that had been set aside for some other use, and that's what the Court in the Solem case referred to. The—stated that a reference to public domain in this context was perfectly consistent with a continuing reservation status.

There's no reason why lands could not be within an Indian reservation and be available for sale to non-Indians. That's the exact thing that happened in each of [21] this Court's cases involving surplus land acts in which the Court held a reservation was not diminished.

QUESTION: And you say that that's the meaning of restored to the public domain, land on reservation which is available for purchase to non-Indians is referred to as public domain.

MR. MANN: It doesn't matter whether it's on a reservation or not, but the phrase, public domain, could be understood to refer to lands that are owned by the United States that are available for sale.

QUESTION: Do you have any instance where—you say it could be. Do you have any instances where it has been, other than this statute?

MR. MANN: The statute at issue in Solem, that's what the Court indicated the most likely understanding of the—

QUESTION: That wasn't the operative language there. That was just—

MR. MANN: No, but the Court did hold that the land was on the reservation. That was the holding of the Court, and the statute stated the land was in the public domain, so the legal effect of the Solem decision is that land which Congress had described specifically as being in the public domain, albeit offhandedly, but in an act that Congress enacted and the President signed, stated that [22] that land was in the public domain, and this Court held that it remained on the reservation.

QUESTION: Well, how about the Rosebud case, where the statute said restored to the public domain resulted—

MR. MANN: Now, in that case also, you'll—if you —when you look at the Rosebud opinion, the statute to which you're referring is not the statute that was at issue before the Court, and the reference occurs in a footnote in the facts statement that described how the Rosebud Sioux Reservation came to the size that was at issue before the 1904, 1907, and 1910 acts, and if you actually look at the statute in that case it becomes fairly clear why the

parties before the Court conceded that the statute altered the boundaries of the reservation.

The title of the statute states that its purpose is to divide a portion of the reservation of the Sioux Nation into separate reservations and to secure the relinquishment of the Indian title to the remainder.

QUESTION: Well, was that mentioned in the opinion?

MR. MANN: I'm not sure whether it was or not.

QUESTION: If it wasn't mentioned in the opinion, it doesn't add anything to your argument, it [23] seems to me, to say there were even additional reasons than those mentioned in the opinion for reaching the result.

MR. MANN: Well, the opinion did not necessarily reach the result. The parties conceded that the reservation —that the land in question there has been removed from the reservation, and the Court was simply summarizing the fact that that—that the land in question was no longer part of the reservation because the Great Sioux Reservation no longer existed, and what remained was the Rosebud Sioux Reservation at issue in the case.

And then the Court went on to consider whether the Rosebud Sioux Reservation had been diminished by the statutes at issue there, so we think that was adequately explained by the fact that the parties would have had no possible basis for suggesting the reservation continued in existence in light of the clear purpose of the statute at hand.

QUESTION: Mr. Mann, in deciding whether the public domain language could mean what you claim it does mean, I suppose we look to intent, and there was a reference to congressional intent a moment ago. The conclusion that was stated was that there was no sort of specific indication, specific to the statutes involved [24] here, of congressional intent.

Isn't it fair to say, however, that if we look further into the state of the congressional enactments at the time

of the 1902, 3, 4, 5 acts, that there was very clearly a policy of the United States, an indication of the policy of the United States in effect to end the reservation system, and shouldn't we read the language in light of that broader policy?

MR. MANN: Well, this Court has had a number of cases that have considered surplus land acts from this period of time, and I think it's fair to say that—

QUESTION: And we declined to do that—

MR. MANN: —in all—in all—

QUESTION: —but were we right, or were we wrong?

MR. MANN: No, I think you were right, because the—what's going on here is, the question of whether reservation boundaries were going to be altered at the time had little practical significance, because the question of criminal jurisdiction turned on the definition of Indian country, which at the time turned solely on who owned the land, so when Congress opened the land to settlement by non-Indians, by that very action it was removing at the time the land from jurisdiction. It didn't have to consider whether it was going to alter the [25] reservation boundaries.

Now, what the Court has done is, it's assumed that if Congress intended to alter reservation boundaries, typically Congress would have stated so specifically, and it's looked very closly to the language of the statutes, and it has had a number of statutes where Congress has quite clearly stated that it intended to alter the boundaries of reservation, and those statutes appear in DeCoteau and Rosebud, and if you look at them, they quite clearly state more or less that the land is being ceded, surrendered, and conveyed, and the Indians are—

QUESTION: Well, certainly, saying more or less is really something of an understatement, because I don't recall in either of those cases that the language said, we intend to alter the boundary of the reservation.

MR. MANN: Well, the language in DeCoteau said that the Indians cede, sell, relinquish and convey to the

United States all their claim, right, title, and interest in the land in question, and the statute in Rosebud stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

[26] QUESTION: I think you're probably right, but to —I wouldn't say that to—it is paraphrasing the language you just quoted to say, Congress says we intend to diminish the reservation.

MR. MANN: I think it is paraphrasing the language to say that that is unambiguous language of cession of the reservation from the Indian tribe to the United States.

QUESTION: Well, it was cession, but this was not cession. I mean, Congress can proceed in one of two ways, either by getting the tribe to cede it, or, if the tribe does not wish to cede it under Lone Wolf, simply declaring the reservation ended. You would not expect to have the language of cession when there's been no cession, and that's what it is asserted occurred here.

MR. MANN: Of course, the statute in Rosebud was enacted long after Lone Wolf as well, and the Indians are not consenting Congress used the language of cession. That seems to be—that phrase seems to be the phrase Congress used when it intended to alter the boundaries of a reservation.

QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear. But still, isn't it the case that in deciding what to make of the less explicit language, the reference to [27] returns to public domain, that we should construe that in light of the overriding congressional policy, which at the time, as I understand it, was to end the reservation system?

MR. MANN: Well, but the policy was that the reservation system would be ended sometime, because Congress anticipated that it would end the reservation system in the future. The concept was not to end the reservation system directly by these particular statutes. The Court has repeatedly said that some of the statutes ended them, and some of them didn't.

QUESTION: Thank you, Mr. Mann.

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EXCERPT FROM OFFICIAL TRANSCRIPT

PROCCEEDINGS BEFORE
THE SUPREME COURT OF THE UNITED STATES

No. 96-1581

SOUTH DAKOTA,

Petitioners,

v.

YANKTON SIOUX TRIBE, *et al.*

Washington, D.C. Monday, December 8, 1997

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ORAL ARGUMENT OF BARBARA B. MCDOWELL
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE RESPONDENTS

MS. MCDOWELL: Mr. Chief Justice, and may it please the Court:

To start with last things first, we'd like to deal with the jurisdiction over the reservation area subsequent to 1894. One can find in the record annual reports from the superintendent of the Yankton Reservation, from 1895, 1896 and so forth, to 18—to 1906, which I believe is the last report in the record—those reports consistently refer to the reservation as a continuing entity. It's interesting that it doesn't demonstrate any significant change at the time of the opening. There's a notation that the reservation was opened, but there is nothing to suggest that there was a major change in the situation on the reservation at the [44] time.

QUESTION: But there's nothing in there, I take it, to suggest that this kind of jurisdiction was being exercised over either allotted lands or the lands that were conveyed in 18—or under the—under the 1892 agreement?

MS. MCDOWELL: The record is unclear as to whether the State or the Tribe or the Federal Government was exercising jurisdiction over the allotted lands at the time. It appears that the only prosecution that is cited from the early era, one in 1895, may well have been on Indian allocated lands. It does not appear clear from my reading of the record.

More significantly, however, the exercise of criminal jurisdiction by the State was not inconsistent at the time with continued reservation status, as the Court noted in the Yakima case. At the time, it was thought that Indian character of the land went with Indian ownership. And it was also thought that once an Indian received an allotment, under the Dawes Act, the Indian immediately became a citizen of the State and subject to its plenary jurisdiction. That was only changed in 1906, which was some time after the Act at issue here.

QUESTION: A theory which is beautifully in accord with the State's notion that everyone would have [45] assumed that if there's nothing left in a reservation but allotted lands, there's no reservation left.

MS. MCDOWELL: Oh, that's a theory that this Court has subsequently rejected over the last 35 years.

QUESTION: But it fits very nicely with what you say to be the—the—the—the understanding, that—that you can't have a—the reservation went with—with Indian ownership.

MS. MCDOWELL: Oh, the Court has acknowledged that in a number of other cases, including Solem, that at the time, the understanding was that Indian status was a property status, but that Congress disabused everyone of that notion in 1948, and that when we are deciding these disestablishment and diminishment issues, we are looking at reservations as they have been considered after '48, and not as they may have been considered 100 years ago.

QUESTION: Well, how—how—what is the normal now? I take it now differently from before 1906. Imagine a reservation of 50 square miles. On one of those square miles live a group of people who are not Indians, who own their land in fee, and who bought it from the Tribe. Now, what law governs? The law of the State governs those people? I know the tribal land does not govern them. So far, it seems to me from what I've looked up, Federal law governs.

[46] MS. MCDOWELL: State law governs them except in some particular instances that this Court has spelled out.

QUESTION: Why does State law govern? Is it that the Federal Government has somehow, through law, statute or regulation, brought in State law?

MS. MCDOWELL: No. It's because the—I understand it's because the State has plenary jurisdiction over its citizens, wherever they reside.

QUESTION: All right. So, in other words, these towns that are upset—I don't understand they're upset, or maybe they shouldn't be upset, because nothing is going to change for them?

MS. MCDOWELL: That's our position, that things should not change—

QUESTION: Then why is it—I'm back at Justice Kennedy's point—why is it that there's some argument here about building a—some kind of thing in this—waste disposal

or what it is—if the State law governs the same as it would if it were not within the reservation?

MS. MCDOWELL: This was a—a particular issue of the EPA'S authority to delegate primary supervision of landfills to the State. And under that permitting authority, the State excluded Indian reservations, as I understand it.

[47] But as a general matter—

QUESTION: What about—what about taxation?

MS. MCDOWELL: As a general matter, the State may tax its citizens on the reservation. Certainly, it can tax the non-Indian citizens just as it would, whether it was a reservation or not. It may also impose significant taxes, such as property taxes, on the Indians.

QUESTION: So in the absence of a Federal statute that explicitly distinguished between what happens on the reservation or not, everything stays the same, but for the Indians themselves, because they would have certain rights under tribal land, et cetera, if it is a reservation, throughout the reservation that they wouldn't have if it isn't; is that right?

MS. MCDOWELL: With a few limited—

QUESTION: Is that right?

MS. MCDOWELL: —exceptions, Justice Breyer. If an Indian commits a crime—if a—a non-Indian commits a crime against an Indian, if it's reservation land, then Federal law rather than State law governs the prosecution.

The State, in A-1—this Court, in A-1 Contractors—

QUESTION: Well, could—could you enlighten us on what lands continued to be owned by the Tribe as such, [48] as opposed to specific Indians by way of allotment—

MS. MCDOWELL: It's—

QUESTION: —after 1892?

MS. MCDOWELL: It's my understanding that those lands were, for the most part, allocated to individual Indians. However, the Federal Government—

QUESTION: Well, I'm hearing a lot of "for the most parts," and "no," and "there's this other land," and "it's scattered." I mean, what is it? How are we to find it?

MS. MCDOWELL: Well, it appears—

QUESTION: How do we know?

MS. MCDOWELL: —from the record, which is not entirely clear, that there were some lands that were subject to allocation, but the actual allocations were not made until sometime after 1894. There's also the mile square area—

QUESTION: But they've all been made—is there any land that was held continuously by the Tribe as such, as opposed to tribal members, since 1892?

MS. MCDOWELL: It's my understanding that there is this mile square area that's referred to—

QUESTION: A one square mile.

MS. MCDOWELL: But, other than that—although there are trust lands today that are held by the Tribe, [49] it's not clear that any of those lands were trust lands earlier. Perhaps Mr. Abourezk could clarify that, however.

QUESTION: Now, this—this is a totally checker boarded situation?

MS. MCDOWELL: That's correct. And this Court—

QUESTION: That was certainly a factor that resulted in our thinking there was at least diminishment in the DeCoteau case.

MS. MCDOWELL: Well, the Court, in DeCoteau, found total diminishment. But that was a different case, in several respects, from this one. In the first place, of course, there was no savings clause preserving rights under an earlier treaty. In addition, the Court placed a lot of emphasis in DeCoteau on the negotiation history with the Tribe. There were a number of statements of tribal leaders, stating that we understand that the reservation is going to disappear, essentially, that we never understood that we would keep this reservation. Here there are no statements like that suggesting any kind of

common understanding that the reservation was going to be extinguished as a result of the Act.

It's interesting that—

QUESTION: But do you—do you agree with both [50] counsel, it seemed to me, that the choice is either we accept your argument based on Article XVIII or there's a diminishment?

MS. MCDOWELL: That's correct.

QUESTION: That there is no such thing as diminishment applicable on these facts?

MS. MCDOWELL: That's correct. Diminishment seems to be limited to cases such as Rosebud, where there was a selling or a ceding of a part of the reservation, in so many words, as opposed to this sort of situation.

QUESTION: Didn't—

QUESTION: May I ask one—

QUESTION: Didn't Judge Murphy say she thought that—that the disestablishment was the rare thing and the diminishment the usual thing? It's a very—

MS. MCDOWELL: Well, disestablishment is very rare. This Court has only found it in one prior case, DeCoteau. And subsequently, in Rosebud, the Court suggested that disestablishment should be more difficult to find.

QUESTION: But—

QUESTION: Ms.—Ms. McDowell, can I go back? You said—you said Rosebud is different because there it involved conveyance of only part of the reservation, in so many words.

[51] MS. MCDOWELL: Yes.

QUESTION: But this case involves a conveyance of only part of the reservation, in so many words. Namely, the part that was held in fee by the Tribe and not the part that had been allotted. Do you mean that Rosebud involved only a conveyance of part of the tribally owned portion of the reservation, in so many words? Is that what you mean?

MS. MCDOWELL: Well, the language to the statute in Rosebud says "We cede a part of our reservation." That kind

of language wasn't used here. The language was, "We cede our surplus lands." There was no reference to selling off all or part of the reservation.

It should also be noted that the word "cede" didn't have any single—

QUESTION: Well, isn't it true that the—

MS. McDOWELL: —settled meaning in the 19th century; that it was—

QUESTION: Isn't it true, though, that apart from the savings clause and the negotiating history, if you just look at the text of the document, the DeCoteau case is just like this, that if you have—let me just finish one question so you can comment—if you assume that's if everything is allotted, you don't have a reservation. And if you, then assume that all that's left [52] is unalloted land, but then you cede your entire authority over the unalloted lands, what can be left?

I have trouble getting your explanation to that.

MS. MCDOWELL: Several responses. There are other differences between this case and DeCoteau.

QUESTION: I understand the differences: because of the history primarily in the absence of the savings clause.

MS. MCDOWELL: And there are other clauses that are in our Act here that were not in the Act in DeCoteau, such as the reservation of lands for Agency school and other purposes. That was not present in DeCoteau; it is present here.

QUESTION: Thank you, Ms. McDowell.

General Barnett, you have 2 minutes left.

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